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TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL., APPELLANTS,

vs.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

FILED JUNE 21, 1937.

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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF SOUTH CAROLINA, AT CHARLESTON

BARNWELL BROS., INC., a North Carolina Corporation; POOL TRANSPORTATION, INC., a South Carolina Corporation; Horton Motor Lines, Inc., a North Carolina Corporation; National Convoy & Trucking Co., a North Carolina Corporation; Planters Fertilizer & Phosphate Co., a South Carolina Corporation; Carolina Transfer & Storage Co., a North Carolina Corporation; Sarah A. Geraty, John W. Geraty, and Charles W. Geraty, Trading as William C. Geraty Co., a South Carolina Partnership; Dewey D. Maner, a Sole Trader, Trading as Maner Transfer Co., of Rome, Georgia; Merchant's Fertilizer Co., a South Carolina Corporation; Akers & Hudson Motor Lines, Inc., a North Carolina Corporation; and South Carolina Produce Association, a South Carolina Corporation, Plaintiffs,

vs.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, Joseph M. Poulnot, Individually, and as Sheriff of Charleston County, and as Representative of All Such Officers; George Bell Timmerman, Individually, and as Chairman of the State Highway Commission of South Carolina, and as Representative Thereof; Ben M. Sawyer, Individually, and as Chief Highway Commissioner of South Carolina; Alfred W. Bohlen, Individually, and as Director of the Motor Vehicle Division of the State Highway Department of South Carolina, and as Representative of Said Department; S. Eakin Wilson, Individually, and as State Inspector for the State Highway Department of South Carolina for Charleston County, and as Representative of All Like Officers in South Carolina; Tee-Hutto, Individually, and as Patrolman for the State Highway Department of South Carolina in Charleston County, and as Representative of All Like Officers in South Carolina; James W. Wolfe, Individually, and as Chairman of the South Carolina Public Service Commission, and as Representative thereof; William W. Goodman, Individually, and as

Superintendent of the Motor Transportation Division of the South Carolina Public Service Commission, and as Representative Thereof; Benjamin K. Sanders, Individually, and as State Inspector for the South Carolina Public Service Commission for Charleston County, and as Representative of All Like Officers in South Carolina; Harold Fox, Individually, and as Magistrate's Constable in Charleston County, and as Representative of All Like Officers in South Carolina; Christian H. Ortmann, Individually, and as Chief of Police for the City of Charleston, South Carolina, and as Representative of All Municipal Police Officers in the State of South Carolina, Defendants

BILL OF COMPLAINT—Filed August 11, 1936

[fol. 3] To the Honorable the Judge of the United States District Court for the Eastern District of South Carolina:

The plaintiffs above named in the caption hereof bring this bill of complaint against the defendants above named, and for their cause and action respectfully represent unto your Honor:

I

1. That the plaintiffs, Planter's Fertilizer & Phosphate Co., and Merchant's Fertilizer Co., with their principal offices and place of business in the City of Charleston, South, Carolina; Poole Transportation, Inc., with its principal office and place of business at Greenville, South Carolina; and South Carolina Produce Association, with its principal office and place of business in the town of Meggetts, South Carolina, are each of them a corporation, organized and existing under and by virtue of the laws of the State of South Carolina.

That the plaintiffs, Barnwell Bros., Inc., with its principal office and place of business in the City of Burlington, North Carolina; Horton Motor Lines, Inc., National Convoy & Trucking Company, and Carolina Transfer & Storage Co., with their principal offices and places of business in the City of Charlotte, North Carolina; and Akers & Hudson Motor Lines, Inc., with its principal office and place of business in the City of Gastonia, North Carolina; are each of them a corporation, organized and existing un-

der and by virtue of the laws of the State of North Carolina.

That the plaintiffs, Sarah A. Geraty, John W. Geraty, and Charles W. Geraty, constitute a partnership trading as William C. Geraty Co., and are each of them residents of Yonge's Island, in the County of Charleston South Carolina and are each of them citizens of the State of South Carolina.

That the plaintiff, Dewey D. Maner, is a sole trader, trading as Maner Transfer Co., and is a resident of the City of Rome, Georgia, and is a citizen of the State of Georgia.

2. That the defendants, South Carolina State Highway Department, and South Carolina Public Service Commission, are administrative agencies of the State of South Carolina, organized and existing under and by virtue of the laws of the State of South Carolina.

That the defendant, Joseph M. Poulnot, is a resident of the County of Charleston, in the Eastern District of South Carolina, and is Sheriff of such County, and that he is representative of all such officers in the State of South Carolina.

That the defendant, George Bell Timmerman, is a resident of the town of Lexington in Lexington County, South Carolina, in the Eastern District of South Carolina, and is chairman of the State Highway Commission of such State, and that he is representative of such Commission.

That the defendant, Ben. M. Sawyer, is a resident of the City of Columbia, South Carolina, in the Eastern District of South Carolina, and is Chief Highway Commissioner of South Carolina.

[fol. 4] That the defendant, Alfred W. Bohlen is a resident of the City of Columbia, South Carolina, in the Eastern District thereof, and is Director of the Motor Vehicle Division of the State Highway Department of such State, and that he is representative of all officers and employes of such Division.

That the defendant, S. Eakin Wilson, is a resident of the City of Charleston, South Carolina, in the Eastern District thereof and is State Inspector for the State Highway Department of such State for the County of Charleston, and that he is representative of all such officers in such State.

That the defendant, Tee Hutto, is a resident of the County

of Charleston, South Carolina, in the Eastern District thereof, and is a Patrolman for the State Highway Department of such State for the County of Charleston, and that he is representative of all such officers in such State.

That the defendant, James W. Wolfe, is a resident of the Town of Inman, Spartanburg County, South Carolina, in the Western District thereof, and is Chairman of the Public Service Commission of such State, and that he is representative of the members of such Commission and the officers thereof.

That the defendant, William W. Goodman, is a resident of the City of Columbia, South Carolina, in the Eastern District thereof, and is Superintendent of the Motor Transportation Division of the South Carolina Public Service Commission, and that he is representative of the officers and employees of such Division.

That the defendant, Benjamin K. Sanders, is a resident of the Town of Walterboro, Colleton County, South Carolina, in the Eastern District thereof, and is State Inspector for the Public Service Commission of such State for the County of Charleston, and that he is representative of all such officers in such State.

That the defendant, Harold Fox, is a resident of Charleston County, South Carolina, in the Eastern District thereof, and is a Magistrate's Constable in Charleston County, and that he is a representative of all such officers in such State.

That the defendant, Christian H. Ortmann, is a resident of the City of Charleston, South Carolina, in the Eastern District thereof, and is Chief of Police of the City of Charleston, and that he is representative of all municipal police officers in the cities of such State.

That each of said individual defendants is an officer either of the State of South Carolina, or of a County or municipality thereof, and all of the above-mentioned defendants are charged with the duty of enforcing, and are empowered to enforce the various laws of the State of South Carolina affecting the plaintiffs hereto, as hereinafter appears, including Act No. 259 of 1933, Regulating and Limiting the Use of the Public Highway in Such State by Motor Trucks, and including Chapter 162 (Sections 8507-8530) Code of Laws of South Carolina, 1932.

II

3. That the jurisdiction of this Court is invoked because the subject matter of the action involves the rights of the plaintiffs under the laws and the Constitution of the United States and the amount in controversy, as to each of the plaintiffs, exclusive of interest and costs, exceeds the sum and value of $3,000.00, as will hereafter appear; and because the suit arises under a law of the United States regulating commerce.

[fol. 5] III

4. That across the State of South Carolina lie trunk arteries of interstate commerce, directly serving and affecting the people of the State of South Carolina, and the people of the States of the Southeast, the Atlantic Seaboard, the Northeast, and the Middle West; that these trunk arteries are natural and essential channels, in the commerce of the nation, for the transportation and exchange of commodities and for intercourse between the peoples of the several states of the United States.

That the fundamental economic and social needs of the peoples of the State of South Carolina and of the various states served by these channels of interstate commerce have for many years past required, do now require, and will continue increasingly to require, that a large share of the movement of goods and commodities in such commerce be transported by motor carriers; that certain necessary and indispensable services and functions of interstate commerce can be performed only by motor transportation on the interstate highways, other methods of transportation being for such purposes totally inefficient and inadequate.

That to meet these needs and to perform these essential functions and services, various corporations and individuals, representative of whom are seven of the plaintiffs hereto, have for many years past invested their monies, properties, and efforts, and have developed, and now offer, and desire to continue to offer, to the people of South Carolina, and to the people of the various States served by these channels of commerce, an adequate, economical and efficient transportation service by motor carriage on the highways; that such commerce requires the use of certain trunk highways leading into, from and across the State of South Caro-

lina; that these highways have been constructed with the aid of funds derived from the users of such highways, and from the government of the United States under the Federal Highway Act, as amended, and other Federal Acts, and that they are and have been maintained by funds derived from the users of such highways; that these motor carriers, including the seven representative plaintiffs hereto, have always contributed and will continue to contribute their due and proportionate share of these costs of construction and maintenance; that these highways have been built and maintained in accordance with the best engineering standards and specifications for highway construction, under the most favorable climatic and sub-soil conditions, and in accordance with the requirements of the Federal Highway Act that *"only such durable types of surface and kinds of material shall be adopted for the construction and reconstruction of any highway for the primary or interstate * * * systems as will adequately meet the existing and probable future traffic needs and conditions thereon", and in accordance with the specifications adopted by Secretary of the Agriculture pursuant to the said Federal Highway Act;* that these highways are now adequate, were designed, and by the specifications adopted by the Secretary of Agriculture pursuant to said Federal Highway Act, as amended, and other Federal Acts, were intended to carry the volume and description of motor traffic now borne by them, including equipment of such specifications as that now possessed and in use by the aforesaid interstate motor carriers and the seven representative plaintiffs hereto, and such motor traffic as may be reasonably expected in the development of a more adequate and efficient interstate system of motor transportation, without causing unreasonable or disproportionate wear and tear upon said highways, or the deterioration thereof, or in any unreasonable manner endangering the safety and lives of the traveling public, or increasing the cost of maintenance of said highways.

5. That, nevertheless, the General Assembly of South [fol. 6] Carolina, in 1933, enacted its Act No. 259, approved April 28, 1933 (38 State. 340) entitled: An Act to Regulate and Limit the Use of the Public Highways in the State by Motor Trucks, Semi-trailers, and Trailers, to Enlarge the Powers of the State Highway Department and Other Bodies

Having like Jurisdiction in Incorporated Cities and Towns in Respect Thereof; and to Provide for the Enforcement of this Act and Prescribe Penalties for the Violation thereof and Exempting Certain of such Motor Trucks, Semi-trailer Motor Trucks, Semi-Trailers and Trailers from the Provisions Hereof, or Certain of Such Provisions, and to Repeal All Laws Inconsistent with This Act.

That Section 3 of such Act provides that *"no person shall use or operate any trailer, as defined in this Act, on any* highway." Section 2 of such Act defines a "trailer" as *"any vehicle designed to be drawn by a motor truck, but supported wholly upon its own wheels, and intended for the carriage of freight or merchandise."*

That Section 4 of such Act provides that *"No person shall operate on any highway any motor truck, or semi-trailer truck whose gross weight, including load, shall exceed* 20,000 *pounds"*. Section 2 of such Act defines a "semi-trailer motor truck" as *"any motor propelled truck, not operated or driven on fixed rails or tracks, designed to draw, and to support the front end of a semi-trailer. The tractor (or motor propelled truck), together with the semi-trailer shall be considered one unit, and the words 'semi-trailer motor truck' as used in this Act shall mean and embrace such entire unit."*

6. The plaintiffs hereto alleged that Section 3 and 4 of such Act are in violation of the 14th Amendment to the Constitution of the United States, in that they constitute an unreasonable, arbitrary and capricious interference with the rights of the plaintiffs to use the highways in a reasonable manner and for a lawful purpose; that such regulations have no real and substantial relation to the avowed objects and purposes of such Act, as declared in Section 1 thereof; that is, to achieve economy in highway costs and to protect the safety and lives of the traveling public, and no real and substantial relation to any other objects or purposes properly within the police power of the State of South Carolina; that the enforcement of such Act will not only not achieve such objects and purposes, but will tend to damage and destroy the highways of South Carolina and prevent the free and safe use of the highways of South Carolina by the traveling public, by increasing the number of vehicles on the highways, and diverting the traffic of motor transportation to smaller, over-loaded, and more

dangerous trucks; that the actual result of its enforcement will be economic, not economical, and will be to limit arbitrarily and unreasonably the use of the public highway by motor trucks engaged in interstate commerce.

7. Plaintiffs further allege that such provisions of said Act are in violation of Section 8 of Article 1 of the Constitution of the United States, in that they have operated, and if enforced, will continue to operate, as a direct and substantial burden on interstate commerce; that the maximum gross weight allowed by other States through which pass the channels of interstate commerce into, from and across the State of South Carolina, are far in excess of the maximum weight allowed by such Act of the State of South Carolina, although the highways of such States are no better constructed or maintained than the highways of the State of South Carolina, and in most cases are not as well constructed or maintained as the highways of the State of South Carolina; that the essential services and functions of interstate commerce cannot be performed by the several plaintiff carriers with the use of motor equipment limited to a maximum weight of 20,000 pounds; that the effect of [fol. 7] such disparity in the case of the State of South Carolina is effectively to disturb and block the orderly and efficient flow of transportation through said channels of interstate commerce into, from and across the State of South Carolina, and effectively to prevent all interstate motor carriers, of which the seven carrier plaintiffs hereto are representative, from rendering to the public that adequate, economical and efficient transportation which is essential to the communities served by them, and which is required by law, and which it is their duty and desire to perform, if permitted so to do.

8. That such Sections of said Act are so arbitrary and unreasonable as to defeat the useful purposes for which the Government of the United States, pursuant to the Federal Highway Act, as amended, and other Federal Acts, has made its large contribution towards the bettering of the highway system of the United States, and for the purposes of the national defense.

9. That the Seventy-fourth Congress of the United States, in August, 1935, passed an Act, entitled the "Motor Carrier Act, 1935," amending and supplementing the Inter-

state Commerce Act, as amended, said Motor Carrier Act being designated as Part II of the Interstate Commerce Act, and was approved by the President of the United States on August 9, 1935; that the said Motor Carrier Act vests in the Interstate Commerce Commission and in "Joint Boards" created under such Act, full, complete and exclusive control and jurisdiction over interstate commerce by motor vehicle and all interstate motor carriers, and thus pre-empted the field of their regulation, and thereby prohibited and excluded the several States of the Union from regulating interstate commerce by motor carriers and motor carriers engaged in interstate commerce, and superseded such legislative enactments of the several states attempting to regulate interstate commerce, as may have been enacted and effective before its passage, including the aforesaid Act of the State of South Carolina.

The said Motor Carrier Act, specifically or by necessary intendment, vests in the Commission and in the "Joint Boards" to be created under such Act, complete and exclusive jurisdiction, as to interstate commerce by motor carriers, over all certificates of public convenience and necessity, permits, rates, fares, charges, practices, discriminations, preferences, adequate service, through rates, economical and efficient service, instrumentalities, vehicles, safety or operation and equipment, standards of equipment, maximum hours and qualifications of employees, weights, lengths, widths, heights, brakes, lights, and other appliances, and all other matters in connection with safety of operation and equipment and standards of equipment, which may now or hereafter require regulation in connection with interstate commerce by motor carriers.

That the said Motor Carrier Act, in Section 205 thereof, recognizing the need for co-operation with the States as to matters of local concern, provides that the Interstate Commerce Commission may refer various matters to Joint Boards, which shall be composed solely of members from the interested States; that the Commission may refer to a Joint Board any matter not specifically mentioned in said section which may arise under the Motor Carrier Act; that pursuant to the provisions of said Section, the State of South Carolina has nominated and the Interstate Commerce Commission has appointed Joint Board representatives for the State of South Carolina.

That in Section 202 (a) of said Motor Carriers Act it is declared to be the policy of Congress "to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound [fol. 8] economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between and co-ordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense, and co-operate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part."

That such Act of the State of South Carolina, in addition to provisions arbitrarily excluding trailers from the highways and limiting the gross weight of all motor trucks and semi-trailer trucks to 20,000 pounds; further, in Sections 5, 6, and 7 thereof, regulates the height, width, and length of all motor-trucks and semi-trailer trucks operating on the highways of South Carolina, including those operating in interstate commerce; and by other sections thereof regulates other matters relating to the safety of operation and equipment and standards of equipment, including those drivers employed by motor carriers engaged in interstate commerce.

Plaintiffs allege that the Motor Carrier Act, 1935, has entirely and completely superseded the said Sections 3, 4, 5, 6, and 7 of such Act of South Carolina, insofar as they may apply to motor carriers engaged in interstate commerce, and such other provisions of such Act that regulate other matters relating to the safety of operation and equipment and standards of equipment of trucks engaged in interstate commerce, and the qualifications of drivers employed by motor carriers engaged in interstate commerce; and that such provisions were void and of no effect, as to such motor carriers, from the date of the passage of such Motor Carrier Act.

That pursuant to the duty imposed and the authority conferred upon it by Section 204 (a) (1) and (2) of such

Motor Carrier Act, 1935, the Interstate Commerce Commission did on July 1, 1936, promulgate proposed safety regulations.

Plaintiffs allege that the enforcement of said provisions of such Act of South Carolina as to motor carriers engaged in interstate commerce, does and will operate as a direct and substantial burden on and interference with interstate commerce, and is thus in violation of Section 8, Article 1, of the Constitution of the United States, in that such enforcement subverts and defeats the declared purposes of the said Motor Carrier Act; that such provisions were not intended to and do not operate to "recognize and preserve the inherent advantages of, and foster sound economic conditions in" motor transportation; that enforcement of such provisions of said Act will prevent, rather than promote "adequate, economical and efficient service by motor carriers"; will create "unjust discriminations, undue preferences and advantages", will operate to discriminate against and destroy the business and service of interstate transportation by motor carriers into, from and across the State of South Carolina, in favor of other forms of transportation, and will render of no effect the effort of Congress by the Motor Carrier Act to "improve the relations between, and to co-ordinate transportation by and regulation of, motor carriers and other carriers"; that such enforcement will operate to destroy the present highway transportation system into, from and across the State of South Carolina, and prevent the development and preservation of "a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense", as contemplated by said Motor Carrier Act, 1935.

[fol. 9] That such defendants, and those for whom they are by this bill alleged representative, and their officers, deputies, agents and employees, purporting to act under and pursuant to such Act, and under color of their representative offices, have unlawfully interferred with and are threatening to interfere with, and as the plaintiffs hereto are informed and believe, propose to interfere with, the lawful operation on the highways of South Carolina by the several interstate motor carriers plaintiffs hereto, of motor equipment which does not, and cannot—if the present adequate, economical and efficient transportation service is to be

maintained, and if the necessary and indispensable services and functions of interstate commerce are to be performed comply with the restrictions and limitations of the Sections 3 and 4 of such Act of the State of South Carolina; that said defendants have arrested, prosecuted, and caused to be fined the agents, servants and employees of such plaintiffs lawfully operating such motor equipment on the highways in interstate commerce, and under the jurisdiction of the Interstate Commerce Commission as heretofore appears; and threaten in the future to arrest, prosecute and cause to be fined such agents, servants and employees of such plaintiffs; that the South Carolina Public Service Commission has refused, and is continuing to refuse to issue such interstate carriers, plaintiffs hereto, operating licenses for equipment not complying with the aforesaid limitations of such Act, although by the laws of South Carolina, operating licenses must be obtained by said plaintiffs for each unit of equipment operated on the highways; that the officers and agents of such Public Service Commission of South Carolina, defendants hereto, and their deputies and employees have arrested, prosecuted and caused to be fined, the agents, servants and employees of such carriers, and threaten in the future to arrest, prosecute and cause to be fined such agents, servants and employees of such carriers, for their failure to have such licenses; that such unlawful interference by arrests, prosecutions, and fines, has interrupted and impaired the service rendered by such carriers, and that if continued, will cause the plaintiffs hereto irreparable damage; that if the aforesaid threats and proposals are carried out, the plaintiffs will be irreparably damaged in great amount, and their businesses will be jeopardized, if not entirely ruined, as will appear more fully hereafter.

That such defendants, and those for whom they are by this bill alleged representative, and their officers, deputies, agents and employees have been enforcing, are enforcing, and threaten to continue to enforce the provisions of Section 5, 6, and 7 of such South Carolina Act, and other sections thereof regulating other matters relating to the safety of operation and equipment and standards of equipment and qualifications of drivers, engaged and employed in interstate commerce.

10. That the plaintiff, Barnwell Bros., Inc., is now, and was for a number of years prior to the passage of such Act

of South Carolina, engaged in the transportation of property in interstate commerce as a common carrier; that it offers by its own facilities or through connecting agencies door to door delivery and daily direct service in the District of Columbia, Georgia, Maryland, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Virginia, and other States, and has branch offices and terminals at Atlanta, Ga., Baltimore, Md., Charlotte, N. C., Cumberland, Md., Greenville, S. C., Newark, N. J., New York City, Philadelphia, Pa., Shelby, N. C., and Washington, D. C.

That the plaintiff, Poole Transportation, Inc., is now, and was for a number of years prior to the passage of such Act of South Carolina, engaged in the transportation of [fol. 10] property in interstate commerce as a common carrier, that it offers door to door delivery and daily direct service into, from, within, and across the State of South Carolina, from and to the States of Delaware, District of Columbia, Georgia, Maryland, New Jersey, New York, North Carolina, Pennsylvania, Virginia and other States, and has traffic agents at Greenville, S. C., Atlanta, Ga., Baltimore, Md., Burlington, N. C., Chester, Pa., Richmond, Va., Charlotte, N. C., Paterson, N. J., and Kings Mt., N. C.

That the plaintiff, Horton Motor Lines, Inc., is now and was for a number of years prior to the passage of such Act of South Carolina, engaged in the transportation of property in interstate commerce as a common and contract carrier; that it offers door to door delivery and daily direct service in the District of Columbia, Maryland, New Jersey, New York, North Carolina, Pennsylvania, Tennessee, Virginia, and other States, as a direct and connecting carrier for the transportation of property into, from and across the State of South Carolina, and has warehouses and terminals at Baltimore, Md., Burlington, N. C., Charlotte, N. C., New York City, Philadelphia, Pa., Richmond, Va., Washington, D. C., Wilkes-Barre, Pa., Cumberland, Md., Hickory, N. C., Greensboro, N. C., and Pittsburgh, Pa.

That the plaintiff, National Convoy & Trucking Co., is now and was for a number of years prior to the passage of such act of South Carolina, engaged in the transportation of property in interstate commerce as a common and contract carrier, offering door to door delivery and daily direct service in Georgia, North Carolina, South Carolina, Tennessee, Alabama, and other States, with traffic agents at

Atlanta, Ga., Chattanooga, Tenn., Greenville, S. C., High Point, N. C., Knoxville, Tenn., Spartanburg, S. C., Winston-Salem, N. C., and Birmingham, Ala.

That the plaintiff, Carolina Transfer & Storage Co., is now, and was for many years prior to the passage of such Act of South Carolina, engaged in the transportation of property in interstate commerce as a contract and irregular common carrier; that it has specialized in the movement of household furniture and goods in interstate commerce, which is an indispensable service and function of such interstate commerce; that it offers such service among all the several states of the United States, but that 35% of its total traffic moves into, from or across the State of South Carolina.

That the plaintiff, Dewey D. Maner, trading as Maner Transfer Company, of Rome, Georgia, is now, and was for many years prior to the passage of such Act of South Carolina, engaged in the transportation of property in interstate commerce as a common carrier; that he offers door to door delivery and daily direct service in Georgia, North Carolina, South Carolina, Tennessee, Alabama, Virginia, Maryland, Pennsylvania, New York, and other States, with terminals at Baltimore, Md., Philadelphia, Pa., New York City, Chattanooga, Tenn., Atlanta, Ga., Birmingham, Ala., and Rome, Ga.

That the plaintiff, Akers & Hudson Motor Lines, Inc. is now and was for many years prior to the passage of such Act of South Carolina, engaged in the transportation of property in interstate commerce as a contract carrier, that it offers door to door delivery and daily direct service in the States of Connecticut, Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and other States, with traffic agents at Gastonia, N. C., Baltimore, Md., Newark, N. J., New York City, Reading, Pa., South River, N. J., Trenton, N. J., and Chester, Pa.

That all of the foregoing plaintiffs are now complying with, and at all times have been willing to comply with, and in the future will continue to comply with, all valid laws and [fol. 11] regulations of the United States and of the State of South Carolina, and its several administrative bodies, applicable to their respective operations; that each of them was in bona fide operation in the capacity alleged on June

1, 1935, and on July 1, 1935, and have complied with all the requirements and provisions of the Motor Carrier Act, and are now lawfully operating under such Act and under the jurisdiction of the Interstate Commerce Commission; that such plaintiffs are charged by the Motor Carrier Act with the duty of providing continuous, adequate, economical and efficient service to the communities and persons served by them, but that the performance of such duty requires the employment of equipment of reasonable size and weight, and such equipment as may not be subjected to the limitations of such Act of South Carolina; that such plaintiffs are by said Motor Carrier Act forbidden to cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality or description of traffic in any respect whatsoever, or to subject any particular person, port, gateway, locality or description of traffic to any unjust discrimination, or any undue or unreasonable prejudice or disadvantage in any respect whatsoever; but that, if denied the use of equipment of reasonable size and weights, the plaintiffs herein, and other carriers engaged in interstate commerce, will be compelled to make, give, and cause unreasonable preferences and advantages to particular persons, ports, and localities, and will be compelled to subject particular persons, ports, and localities served by the natural channels of interstate commerce into, from and across the State of South Carolina, to unjust discriminations, disadvantages, and undue and unreasonable prejudices.

That the result and effect of the enforcement of such Act of South Carolina will be to substantially increase the cost of and time of transportation by such plaintiffs, and will thereby substantially increase the costs of such transportation to the public served by them, and will substantially affect and increase the price of goods moving in interstate commerce to the public purchasing such goods; that it has been and will be necessary that such plaintiffs divert and re-direct their routes of transportation to avoid the obstruction created by such Act, since the natural channels through which flow the normal interstate traffic, and through which, in the absence of such Act and its enforcement, it would continue to flow, have been obstructed, and such flow has been and will be in greater measure diverted to other and unnatural interstate channels; that the quantity

of goods moving in such interstate commerce has been and will continue to be substantially decreased; that channels through which the normal interstate flow occurs have been so obstructed and will continue to be so obstructed if such Act is enforced, that such plaintiffs and other interstate motor carriers will be unable to perform the necessary and indispensable services and functions of interstate commerce.

That the plaintiffs, Merchants Fertilizer Company, and Planter's Fertilizer & Phosphate Company are and were for many years prior to the passage of such South Carolina Act engaged in the manufacture and preparation of large quantities of fertilizers and agricultural chemicals, serving extensive agricultural communities with essential fertilizer needs in Georgia, South Carolina, North Carolina, Florida, and other States; that economy and efficiency of service has required and now requires that delivery from point of manufacture to the communities and persons served be accomplished by motor transportation employing equipment of reasonable weights and sizes, but that such service could [fol. 12] not have been, and cannot be effected with equipment unreasonably limited in accordance with such provisions of said South Carolina Act.

That the plaintiff, South Carolina Produce Association, Inc., is, and was for many years prior to the passage of such South Carolina Act, a profit-making co-operative marketing association, incorporated by the State of South Carolina, in accordance with the Federal and State co-operative marketing acts; that it has some 200 members who are large and extensive producers of fresh vegetables and farm products in the State of South Carolina, that the Association ships 75% of such produce into interstate commerce which must move across certain trunk highways of the State of South Carolina in order to reach the natural markets of the Association in the urban and metropolitan centers of the North, Northeast and Middle West; that the Association furnishes to the peoples of these sections of the United States an indispensable delivery service of fresh vegetable foods from field to market; that practically all of such commerce moves, and because of the exigencies of time and cost of transportation, and necessity for refrigeration, must move, by motor carriage over the highways of South Carolina into connecting highways of other States;

that no other form of transportation is able to perform such indispensable service and function of interstate commerce either efficiently or adequately; that the necessity for refrigeration and economy of ultimate cost to the consumer requires that the motor equipment carrying such commerce exceed the gross limit allowed by such South Carolina Act; that the enforcement of the South Carolina Act will destroy the plaintiff's business by rendering it impossible to compete with its seasonal competitors in other sections of the United States, and will prevent the Association from serving its natural markets with fresh farm produce when it has no competition because of differences in harvest time.

That the plaintiffs, Sarah A. Geraty, John W. Geraty and Charles W. Geraty, trading as William C. Geraty Company, are large and extensive producers of fresh vegetables and farm products in the State of South Carolina; that such produce is shipped by motor carriage on the highways of South Carolina in interstate commerce; that such Act of South Carolina, its enforcement, and threatened enforcement, has tended to destroy their business and prevent them from contributing to the indispensable and necessary services and functions of interstate commerce in the manner above alleged as to the plaintiff, South Carolina Produce Association, Inc.

That the enforcement of such South Carolina Act will result in irreparable dam-ge to the business and services of such plaintiffs, the Planter's Fertilizer & Phosphate Company, Merchant's Fertilizer Company, South Carolina Produce Association, and William C. Geraty Company; will seriously curtail the volume of their business, will add to the cost of their products and substantially increase the price to the consumer; will lengthen the time and seriously impair the efficiency of their delivery service; will result in unjust and unreasonable discrimination, disadvantage, and prejudice against them and in favor of their competitors in other sections of the United States.

11. That each of the plaintiffs hereto has made large investments of money, property and effort in the respective businesses in which they are engaged as alleged heretofore; that the necessary effect of the enforcement of the South

[fol. 13] Carolina Act will be to curtail the business of each of the plaintiffs, damage or destroy their investments in an amount, and reduce their lawful profits, in an amount, greatly in excess of One Thousand ($1,000.00) Dollars for each month that they are thus unlawfully prevented from a reasonable use of the highways of the State of South Carolina.

12. That the plaintiffs hereto are but a numbered few of numerous carriers, manufacturers, producers, and shippers who perform services and engage in business in the stream of interstate commerce that flows through the aforesaid natural channels of trade into, from and across the State of South Carolina and that the necessary effect of the enforcement of such Act of South Carolina has been, and will be, to damage them and discriminate against them in like manner as the plaintiffs have alleged above as to themselves.

13. That the plaintiffs hereto are without adequate remedy at law, and must seek relief from such unlawful interference and must attempt to avoid such irreparable damage in a Court of Equity.

IV

To the end that the plaintiffs may have that relief which they can obtain only in a Court of Equity, they hereby pray:

That writ of subpœna issue out of and under the seal of this Court directed to each and all of the defendants hereto, and that duplicate writs be issued against such defendants as are alleged herein to be residents of the Western District of South Carolina, directed to the Marshal of said District, in accordance with Section 52 of the Judicial Code;

That it be adjudged and decreed that Sections 3 and 4 of the Act of South Carolina, 1933, No. 259 (38 Stats. 340) are in violation of the 14th Amendment to the Constitution of the United States, in that they are unreasonable, arbitrary, and capricious, and that they have no real and substantial relation to the objects sought to be obtained by such Act; that Sections 3 and 4, 5, 6 and 7 of such South Carolina Act, and such other sections thereof relating to the safety of operation and equipment and standards of

equipment, and qualifications of drivers engaged and employed in interstate commerce, are void and of no effect as to interstate commerce and the instrumentalities of interstate commerce, as they have been superseded by the Motor Carrier Act, 1935, and are in violation of Section 8, Article 1 of the Constitution of the United States, as they constitute a direct and substantial burden on interstate commerce, and a direct and substantial interference with the declared objects and purposes of the Motor Carrier Act, 1935.

Plaintiffs further pray that upon final hearing herein a permanent injunction may be granted enjoining said defendants, their representatives, officers, deputies, agents and employees, and all persons acting or attempting to act under or by virtue of their authority, direction or control, and any person and every person acting or attempting to act under or by virtue of the authority, of said Act of South Carolina, from in any way enforcing the said provisions of such Act against the plaintiffs hereto, their [fol. 14] agents, servants, or employees, while engaged in interstate commerce, from bringing or prosecuting any suit, action, or proceedings, criminal or civil, to enforce the penalties provided in said Act, or to compel compliance with such Act, or from doing any act or in any way interfering with the rights of the plaintiffs to carry on their businesses in interstate commerce free from the invalid requirements of such Act.

That plaintiffs may have such other and further relief as the exigencies of the case may require and to the Court may seem meet and proper.

Dated this, the 11th day of August, 1936.

By (Signed) S. King Funkhouser, J. Ninian Beall, Frank Coleman, L. Mendel Rivers, Counsel for Plaintiffs.

(Complaint verified.)

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS—Filed September 19, 1936

Now come the defendants and move the Court to dismiss the bill of complaint upon the following grounds:

1. The bill of complaint fails to state a cause of action in equity entitling the plaintiffs to the relief prayed for therein.

2. There is no averment of facts sufficient to show a violation of any of the sections of the Constitution of the United States relied upon in the complaint or to show an invasion of any constitutional right of plaintiffs.

3. The allegations in the bill of violation of the Fourteenth Amendment to the Constitution of the United States fail to disclose any unreasonable, arbitrary or capricious interference with the rights of plaintiffs to use the highways of the State of South Carolina.

4. The respects in which the Act is alleged to violate the Fourteenth Amendment are within the police power of the State of South Carolina and the State has found as a fact and declared by its legislation in said Motor Carrier Act [fol. 16] of 1933 that the standards of weight, height, width and length prescribed by said Act are necessary to achieve economy in highway cost and permit its highways to be used freely and safely by the traveling public, and that the operation of trailers on any highway in the State endangers the safety and lives of the traveling public.

These limitations and prohibitions are manifestly subjects within the broad range of legislative discretion and it is not within the competency of the courts to set aside such exercise of police power of a State because of dispute of the facts so found by the legislature.

5. The provisions of the South Carolina Motor Carrier Act of 1933 which are alleged by the bill to violate the Fourteenth Amendment to the Constitution of the United States are sustained as a valid and reasonable exercise of the police power of the State, by facts of which there is common knowledge and of which the Court will take judi-

cial notice. The allegations of the bill seeking to deny or controvert such facts are insufficient to warrant the Court in setting aside such valid exercise of the police power of the State.

6. The averments of fact, if any, contained in the bill to sustain the charge of violation of the Fourteenth Amendment and a violation of Section 8 of Article I of the Constitution have been advanced from time to time and the questions are foreclosed by the decisions of the Supreme Court of the United States. The Supreme Court of the United States and the Supreme Court of South Carolina, on identical or like averments of fact, in a suit involving the constitutionality of the Motor Carrier Act of 1933 (State v. Jno. P. Nutt Co., 185 S. E. 25, certiorari denied, 56 S. Ct. Rep. 668) held the plaintiff not entitled to proof of such allegations, upon the ground that said questions had been foreclosed by the decisions of courts of both per-
[fol. 17] suasive and controlling authority.

7. The averments in Paragraph 8 of the bill relying upon the Federal Highway Act do not state a cause of action for that it has been held as matter of law by the Supreme Court of the United States and the Supreme Court of South Carolina that the police power of a state concerning its highways has not been impaired by the federal highway aid statutes. This was conclusively so held as matter of law by the Supreme Court of the United States in the case of Morris v. Duby, 274 U. S. 135, and by the Supreme Court of South Carolina, certiorari denied by the Supreme Court of the United States, as to the South Carolina Act of 1933 regulating motor carriers, in the case of "State v. Jno. P. Nutt Co.," 185 S. E. 25, certiorari denied, 56 S. Ct. Rep. 668.

8. The averments in Paragraph 9 that the Act of Congress known as the Motor Carrier Act of 1935 has entirely and completely superseded Sections 3, 4, 5, 6, and 7 of the Act of South Carolina, in so far as they apply to motor carriers engaged in interstate commerce, are insufficient in law in that the Act of Congress relied upon shows upon its face that the federal government has not occupied the field.

9. The averments in Paragraph 9 that the Act of Congress known as the Motor Carrier Act of 1935 has entirely and completely superseded Sections 3, 4, 5, 6, and 7 of the

Act of South Carolina, in so far as they apply to motor carriers engaged in interstate commerce, are insufficient in law in that for an Act of Congress to regulate the size and weight of motor vehicles to be employed upon the highways of a state is beyond the power of Congress under the Commerce Clause and in violation of the Tenth Amendment to the Constitution of the United States.

[fol. 18]. 10. In the event the foregoing motion to dismiss the whole complaint should be overruled, defendants further move, in the alternative, to dismiss paragraphs 4, 5, and 6 thereof, on grounds 3, 4, 5 and 6 of this motion set out above as reasons for dismissal of the whole complaint.

11. Defendants further move in the alternative, in the event the motion to dismiss the whole complaint be overruled, to dismiss paragraphs 7 and 8 thereof, on ground 7 set out above as reason for dismissal of the whole complaint.

12. Defendants further move in the alternative, in the event the motion to dismiss the whole complaint be overruled, to dismiss paragraphs 9 and 10 thereof, on grounds numbered 8 and 9 set out above as reasons for dismissal of the whole complaint.

John M. Daniel, Attorney General; J. Ivey Humphrey, Assistant Attorney General; M. J. Hough, Assistant Attorney General; Blease & Griffith, Counsel for Defendants.

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM ON MOTION TO DISMISS BILL—Filed October 24, 1936

Plainly the essentials for Federal jurisdiction are present. Decision of the case involves both laws and Constitution of the United States. A special statute of Congress regulating Interstate Commerce will have to be construed in deciding the case. In addition to the constitutional question involved, diversity of citizenship is present. Plainly the amount involved exceeds Three Thousand Dollars.

The Bill of Complaint seeks a permanent injunction against two South Carolina Administrative Bodies, Highway Commission and Public Service Commission. The complaint is directed at an Act of the Legislature of South Carolina approved April 28, 1933, 38 Statutes, 340, entitled "An Act to Regulate and Limit the Use of The Public Highways in the State by Motor Trucks, Semi-trailers Trucks, semi-trailers, and Trailers, to Enlarge the Powers of the State Highway Department and Other Bodies Having Like Jurisdiction in Incorporated Cities and Towns in Respect Thereof; and to Provide for the Enforcement of this Act and to Prescribe for the Violation Thereof and Exempting Certain of Such Motor Trucks, Semi-trailer Motor Trucks, Semi-trailers and Trailers from the Provisions Hereof, or Certain of Such Provisions, and to Repeal All Laws Inconsistent with This Act." Sections 3 and 4 of the Act are summarized in the Bill as follows:

"That Section 3 of such Act provides that *'no person shall use or operate any trailer, as defined in this Act, on any highway.'* Section 2 of such Act defines a 'trailer' as *'any vehicle designed to be drawn by a motor truck, but supported wholly upon its own wheels, and intended for the carriage of freight or merchandise.'*

"That Section 4 of such Act provides that *'No person shall operate on any highway any motor truck, or semi-trailer whose gross weight, including load shall exceed* 20,000 *pounds.'* Section 2 of such Act defines a 'semi-trailer motor truck' as *'any motor propelled truck, not operated or driven on fixed rails or tracks, designed to draw, and to support the front end of a semi-trailer. The tractor (or motor propelled truck), together with the semi-trailer shall be considered one unit, and the words 'semi-trailer motor truck' as used in this Act* shall mean and embrace such entire unit."

[fol. 20] It is alleged that the enforcement of these Sections will constitute an unreasonable, arbitrary and capricious interference with the rights of the plaintiffs to use the highways in a reasonable manner and for a lawful purpose, and that such enforcement will be in violation of the 14th Amendment to the Constitution of the United States. It is further alleged, paragraph 7 of the Bill, that the provisions of this Act when enforced will act as a direct and

substantial burden on Interstate Commerce. That, therefore, this Act is violative of the constitutional provisions placing the power of regulating Interstate Commerce with the National Congress. Paragraph 8 of the Bill alleges that this Act is in violation with certain provisions of the original Federal Highway Act, under the terms of which the Federal Government has made large contributions to the construction of the highway systems in the United States and for the purpose of national defense.

In addition to the foregoing attacks on the South Carolina Statute, which are similar to attacks made on this and other State Statutes in many previous cases, a new attack is made in this Bill. This grows out of the passage by Congress of a Statute known as the "Motor Carrier Act of 1935". So far as we have been able to ascertain, this new attack has never been ruled upon by any Federal Court.

We, therefore, divide our discussion of the Motion to Dismiss into two major headings; the first involving all of the attacks on the Constitutionality of the South Carolina Statute which have been before the Courts a number of times; and the second, the attack on the Constitutionality of the section based upon the contention that Congress has by the "Motor Carrier Act of 1935" legislated upon the same matters and that, therefore, the State Act must yield to the Federal Act.

The Motion to Dismiss will, in our opinion, have to be granted as to the grounds embraced in the first major division. To state the matter very briefly, but perhaps at as great length as is necessary, we take the view that the allegations of the Bill as to those Constitutional questions are so similar to the allegations in many cases which have been decided by the United States Supreme Court that we are safe in concluding that the decisions in these previous cases control this case absolutely. Such cases as Morris v. Duby, 274 U. S. 140; Sproles vs. Binford, 286 U. S. 374; and Continental Baking Co. vs. Woodring, 286 U. S. 352, point the way to a correct decision of this case on the grounds referred to so definitely that we do not hesitate to grant the Motion to Dismiss on these grounds. In addition to all that, the United States Supreme Court denied certiorari in the case of State Ex Rel. Daniel, Attorney General, vs. John P. Nutt Company, Inc., et al. 297 U. S. 724; 185 S. E. 25. This was a decision of the South Caro-

lina Supreme Court involving the identical statute complained of here. Certainly, therefore, the Supreme Court has taken the view that so far as these constitutional attacks on the statute are concerned they are controlled by the previous decisions of that Court.

[fol. 21] Argument is next made that under the limitations upon the doctrine of "stare decisis" which the Supreme Court of the United States has recognized in constitutional cases depending for decision upon the actual factual application of the statute to greatly changed conditions, a situation is presented here where the Court should take the testimony and rule upon the constitutional question in the light of the changed situation since the last decision of the Supreme Court.

We recognize the force and effect of the proposition so earnestly advanced by counsel for the plaintiffs. We go further and say that such a situation might be alleged where a Court taking judicial knowledge of these major changes in the national life, to which the Court cannot shut its eyes without stultifying itself, and anticipating the probable factual showing, refuse to dismiss a bill involving the same constitutional questions dealt with in the previous decisions. But even construing the doctrine of "Stare decisis" as being limited by this more or less well established practice, we do not think that the instant case calls for the application of that practice.

Of course, the transportation of this country is moving more and more in motor vehicles. No one would doubt that the complainants could probably show an enormous increase in motor transportation in the last few years, but we have serious doubts that any revolutionary change has taken place with respect to the Interstate motor transportation through South Carolina since the Supreme Court of the United States denied certiorari in the Daniels vs. Nutt case. Attention is invited to the fact that this denial of certiorari was as late as March 30, 1936.

But while willing to dismiss the Bill so far as these contentions are concerned without taking testimony on the allegations of the Bill, we think that a new question is presented by paragraph 9 of the Bill. This paragraph as indicated above, makes an attack on the Statute of South Carolina on the ground that it conflicts with the "Motor Carrier Act of Congress 1935". In short, it is alleged that

Congress by the "Motor Carrier Act of 1935" has exercised the power given it by the Federal Constitution to regulate Interstate Commerce and that the Statute of South Carolina attempting to control the same subject matter must fall.

No one will contend that this abstract proposition of constitutional law is not sound. The ruling on motion to dismiss must be based upon the construction of the Statute rather than the decision of the final constitutional question of whether or not the power of Congress to regulate Interstate Commerce will here overrule the police power of a State to regulate travel over its own highways. The Supreme Court of the United States in such cases as Sproles v. Binford et al has certainly shown great deference to the police power of a State with respect to the regulation of all travel over the highways within the State, but all of these questions were decided by the Supreme Court of the United States before the "Motor Carrier Act of 1935" was passed and never in any of these cases, therefore, was the question [fol. 22] presented or decided as to where the power of Congress, when exercised by a definite Statute, ends in the control of Interstate Commerce, and the police power of the State, exercised for the safety of its citizens and preservation of its own highways, begins. Plainly, the decision of this delicate question of constitutional law can much better be made after the taking of testimony and the presentation of the factual situation as it actually exists, and consideration thereof by the Court.

But conceding all of this, and conceding that the constitutional rights of a citizen can best be decided by an Appellate Court in the light of full factual revelation, and conceding that this doctrine has been so recognized by the Supreme Court that it has developed a separate and distinct standard with respect to factual review in constitutional law cases from that used in cases involving no constitutional point,* the State of South Carolina still contends that here there is no need for taking the testimony because the statute itself (Motor Carrier Act 1935) shows on its very face that Congress has not attempted to regulate the size and weight of

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*"The Committee appointed on uniform Rules for Practice in Actions at Law and Suits in Equity in Federal Courts have confessedly recognized that this distinction exists.

the vehicles (trailers included) to be used in such Interstate Commerce.

Manifestly, if the Act does not purport to give to the Interstate Commerce Commission the power to regulate the same matters which are regulated by the South Carolina Act, already sustained as to its constitutionality on other grounds, then no occasion will exist for a decision of the delicate question of constitutional law above outlined. So, we come to the question which must control our decision on the motion to dismiss, namely, does the "Motor Carrier Act" when reasonably construed attempt to regulate the same matters which are regulated by Sections 3 and 4 of the South Carolina Act of 1933? The problem is one, therefore, of statutory construction.

We take the following principles to be involved:

I

The Supreme Court has since the day of Gibbons v. Ogden construed the constitutional provisions giving the Federal Congress control over Interstate Commerce most liberally in favor of the control by the central government of every activity which directly affects Interstate Commerce. We think the continued growth of American business depends upon the continued adherence to this principle.

[fol. 23]

II

Whenever a State has enacted a Statute which upon full investigation of the factual situation compels the conclusion that the Statute will substantially affect and constitute a direct burden upon Interstate Commerce the State Statute cannot stand in the face of Federal regulation of the same subject matter.

III

When Congress passes a Statute and the Courts are called upon to construe it, it must be construed in the light of the situation existing at the time the Statute was passed.

IV

That in interpreting a Statute dealing with subject matter closely akin to the subject matter of another Statute which has been frequently before the Supreme Court, the decisions of the Supreme Court on questions dealing with kindred

subject matter should point the way to the decision of a case involving the new Statute, therefore, we think the decisions of the Supreme Court dealing with the Transportation Act 1920 should guide us in the interpretation of the "Motor Carrier Act of 1935". In the one, Congress gave the Interstate Commerce Commission very large authority as to minute details in controlling the transportation by railroads; in the other, Congress has after years of discussion finally enacted a Statute which gives to the same Commission large powers over Interstate transportation by motor carriers.

On first study of the "Motor Carrier Act of 1935", we were impresed with the fact that there had been a studied avoidance of the use of the words "size" and "weight" in the Act. When some of the committee discussions and reports were argued to this Court, it seemed that this studied avoidance was the result of the decision of Sproles vs. Binford and Baking Company vs. Woodring. Indeed some of the Members of Congress and Senators supporting the legislation seemed to have very serious doubts as to whether or not the Congress could, in the light of Sproles vs. Binford and Baking Company vs. Woodring, regulate the size and weight of the vehicles used in Interstate Commerce and over the roads of particular states. In addition to this, the insertion of Section 225 in the Act as finally passed lends strong support to the contention that Congress did not intend to give the Interstate Commerce Commission power to regulate the size of trucks and trailers to be actually used. It is contended that all of this was done because Congress had serious doubts about its own authority to deal with matters which the Supreme Court had already said were within the police power of a state. If Congress, therefore, thinking the limitation existed, studiously avoided control over the matter of size and weight, then how can it be said that the Act gives the Interstate Commerce Commission power over these two subject matters? This argument, however, is to our mind more of an academic argument than one which should control our decision. A broad principle of statutory construction we think should control [fol. 24] us here, namely, that when Congress asserts its power to regulate some phase of Interstate Commerce and vests this power in a Federal regulatory body, then it will be held that Congress meant to give that body full power

over all phases of the subject matter which are necessary to the full and complete exercise of the Federal power over that phase of Interstate Commerce. Succinctly, if the Interstate Commerce Commission is to perform all of the duties and functions which are put upon it by this new Act, it is hard to escape the conclusion that it will be necessary for the Commission to have power to regulate the size of the motor vehicles, trucks and trailers used by the carrier under their control.

Now, as to the impending conflict between Federal regulation of Interstate Commerce and the inherent police power of a State, that is a delicate, difficult and important question of constitutional law which must be later decided. What we now decide is that merely on the pleadings, without enlight-ment as to the factual situation actually existing in the country today, we are unwilling to say that the plain and definite meaning of the "Motor Carrier Act of 1935" was to exclude from the powers given to the Interstate Commerce Commission all power to regulate the size and weight of motor vehicles used in Interstate Commerce.

We, therefore, think that we would be abusing our discretion and committing error of law to dismiss this Bill as to the contentions raised by paragraph 9 thereof without affording the complainants an opportunity to offer testimony thereabout. We cannot escape the conclusion that this Court, after hearing testimony similar to that presented to the committees of Congress when the Statute was being discussed can much more correctly construe the intention of Congress than we could merely upon considering the Statute itself. Dictionary definitions of terms are frequently misleading, particularly when those terms are used in the light of factual situations recently developed and having a very definite meaning by reason of the facts out of which the legislation grows. This principle has been recognized by the Supreme Court in interpreting the Transportation Act of 1920. This particular Court was faced with a similar problem in the case of P. & N. vs. Interstate Commerce Commission et al 286 U. S. 299. There the dictionary meaning of the words in a phrase had to yield to the meaning which the phrase took on when considered in the light of the factual situation in the light of which Congress passed the Statute. To sum up our position, therefore, we think.

I

An Order should be granted dismissing the Bill as being without merit as a matter of law as to all of the allegations in paragraphs 6, 7 and 8 thereof; that these questions have been adjudicated so recently by the Supreme Court of the United States that there is no occasion to hear testimony thereon.

[fol. 25] II

That, however, as to the allegations in paragraph 9 with respect to the interpretation and force and effect of the Motor Carrier Act of 1935" a new question is presented and that the complainants are entitled to introduce testimony thereon within the discretion of this Court. The Court is of the opinion that a correct ruling on these allegations can much better be had after the testimony has been heard than merely upon considering the allegations of the Bill and the words of the Statute itself.

III

That the questions thus presented will, as the Court now sees them, be substantially as follows:

1. Does the "Motor Carrier Act of 1935", when construed in the light of testimony offered, control and regulate the question of sizes and weights of the motor trucks and trailers used in Interstate Commerce? This will be a problem of statutory construction in the light of factual showing.

2. Should this Court decide that the Statute does not give the Interstate Commerce Commission power over this subject matter, the Bill would then be dismissed on its merits; should, however, the Court come to the conclusion that the Statute "Motor Carrier Act of 1935" does give the Interstate Commerce Commission control over the sizes and weights of the vehicles involved, then the Court would be compelled to address itself to the delicate, difficult and important question of constitutional law, namely, to decide which controls in the instant case—power of Congress over Interstate Commerce by reason of constitutional provision thereabout, or inherent power of a sovereign state. To decide this question will be difficult enough with a full factual showing before the Court. To risk a decision on pleadings

and rule in an abstract way, deciding the question more or less in vacuo, would, we think, be an absurdity. The importance of a complete factual showing in questions involving constitutional law has been adverted to time after time by the Supreme Court of the United States. Perhaps never before has the wisdom of taking testimony in such cases been more strongly stated than in the recent decision of N. C. & St. L. Ry. vs. Walters 55 Sup. Ct. Rep. 486, 294 U. S. 405. There the trial Judge heard the testimony in such case and ruled on it and the Supreme Court of the United States finally held that it was proper for him to do so, and pointed out that in such cases constitutional questions can best be decided when facts are fully developed. We are not called upon at the present time to deal with the interesting question so recently discussed in the St. Joseph stockyards case as to the weight attributed to findings when once made by regulatory bodies when such findings are reviewed by a Court, but the importance of the general subject of factual findings in deciding constitutional cases is made clear when the Supreme Court devotes so much time to pointing out the correct rule of appraising the factual findings when once made.

[fol. 26] Let the attorneys for the complainants submit a proposed Order refusing to dismiss the Bill as to the legal question raised by paragraph 9 of the Bill, and let the attorneys for the defendants submit a proposed Order dismissing the Bill with respect to the allegations of constitutionality and illegality of the Statute as set forth in paragraphs 6, 7 and 8 of the Bill.

(Signed) J. Lyles Glenn, United States District Judge.

October 22nd, 1936.

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING MOTION TO DISMISS BILL OF COMPLAINT IN CERTAIN PARTICULARS—Filed November 2, 1936

For the reasons stated in a brief memorandum Opinion of this Court dated October 22, 1936, and on motion of Hon. John M. Daniels, Attorney General of South Caro-

lina, and Messrs. Blease and Griffith, special counsel herein, it is

Ordered, Adjudged and Decreed that the motion to dismiss the bill of complaint herein be, and the same is hereby granted as to paragraphs 4, 5, 6, 7 and 8 of major paragraph 3 of the said bill of complaint. That this Order granting the motion to dismiss be, and the same is without prejudice to the plaintiffs to insist upon the contentions set forth in paragraph 9 and the other portions of said bill.

It is so Ordered.

J. Lyles Glenn, United States District Judge.

October 30, 1936, Rock Hill, South Carolina.

[fol. 28] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS AS TO PARAGRAPH 9 OF BILL OF COMPLAINT—Filed November 2, 1936

This cause came on this day to be heard upon the Bill of Complaint filed herein, upon the motion of defendants to dismiss the Bill, upon the argument of counsel heretofore made and briefs in support thereof heretofore filed. Now, Therefore, upon due consideration of such pleadings and the argument and briefs of counsel, it is hereby Adjudged, Ordered and Decreed

That the motion to dismiss the Bill as to Paragraph 9 thereof be and the same is hereby overruled.

It is Further Ordered that the defendants be allowed 20 days from this date within which to Answer or otherwise plead.

J. Lyles Glenn, United States District Judge.

Oct. 30th, 1936.

[fol. 29] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR TEMPORARY INJUNCTION—Filed November 2, 1936

The plaintiffs herein now move the Court for a temporary injunction restraining and enjoining the defendants,

or any of them, during the pendancy of this action, from committing, doing or performing, or attempting to commit any of the acts described and set forth in the prayer of the Bill of Complaint in this cause, on the ground that the Motor Carrier Act, 1935, supercedes Sections 4, 5, 6 and 7 of the Act of the General Assembly of South Carolina, 1933, No. 259, approved April 28, 1933, (38 State. 340), for the following reasons:

1. By decree of this Court heretofore entered the defendants' motion to dismiss the Bill of Complaint has been overruled as to Paragraph 9 of the said Bill of Complaint, putting the defendants to answer, and entitling the plaintiffs to a trial on the merits as to the issues raised in said Paragraph 9.

2. That the plaintiffs are informed and verily believe that the defendants will on the 1st day of November, 1936, commence rigid state-wide enforcement of the provisions of such Act.

3. That such threatened enforcement of such Act, even though the period of enforcement be for only a short period of time, and only for a period between November 1, 1936, [fol. 30] and the date of final hearing and decision in this suit, will cause the plaintiffs herein immediately and irreparable injury, loss and damage for which they would have no adequate remedy at law.

S. King Funkhouser, J. Ninian Beall, Frank Coleman, L. Mendel Rivers, Counsel for Plaintiffs.

October 30, 1936.

[fol. 31] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER PERMITTING THE FILING OF MOTION FOR TEMPORARY INJUNCTION—Filed November 2, 1936

This day came the Plaintiffs, by counsel, and asked leave to file their written motion for Temporary Injunction, which leave is hereby granted and the same is hereby filed.

J. Lyles Glenn, United States District Judge.

Oct. 30, 1936.

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OPINION ON MOTION FOR TEMPORARY INJUNCTION—Filed November 2, 1936

The plaintiffs above named filed their bill in this Court seeking a permanent injunction against the defendants. The defendants are State Officers who in various capacities are charged with the enforcement of laws regulating motor carriers for hire over the highways of South Carolina. The bill was filed on August 11, 1936, extension of time for answering was agreed upon pending the argument and decision of a motion to dismiss. As soon as possible this Court heard the motion to dismiss. After due consideration the motion to dismiss was granted in part and denied in part, the ruling of the Court being evidenced by a Memorandum Opinion dated October 22nd. An Order was signed and filed on October 30th carrying into effect the views stated in the Opinion. On the same day, after notice, plaintiffs' motion for a restraining order was heard. The Court allowed the plaintiffs to file an application for a restraining order or interlocutory injunction. On this motion for interlocutory injunction, for so it is in fact no matter by what name the desired order be called, was heard testimony taken and decision must now be made on this motion. The [fol. 33] enforcing agencies have declared their intention to begin enforcement of the statute complained of on Monday, November 2nd, and unless restrained by this Court such enforcement will become a reality and seriously injure the plaintiffs' businesses.

It is important to know that no such danger was imminent on August 11, 1936, when the bill was filed, but such danger has become imminent by reason of the threatened enforcement of the Act. Manifestly, with no interlocutory injunction sought in the original bill there was no occasion to even consider the application of Section 266 Judicial Code, Section 380, Title 28 U. S. C. A. and the convening of a Three Judge Court. But, now that an application for interlocutory injunction has been filed a serious question is presented as to whether or not this Court has jurisdiction to grant any Orders except those preliminary to the convening of a Three-Judge Court. If Section 380 applies,

the duties and powers of the individual Judge are very limited. See Stratton vs. St. L. & S. W. Rwy. Co. The State contends that although the bill has been dismissed as to a number of its paragraphs, there still remains in the bill contention based on a substantial claim of unconstitutionality, under the Federal Constitution, of the State Statute in question. Prima facie, therefore, it would seem that beyond question the case is one to which Section 380 applies and Three Judges must hear the application for interlocutory injunction.

The plaintiffs suggest, however, that this Court, composed of an individual Judge, hearing the motions has power to issue the injunction. It is contended that the situation is similar to that presented in Baird vs. Smith 12 Fed. Sup. page 964. Further authorities, consideration of which will [fol. 34] make plain the contentions in this regard, are Ex Parte Hobbs 280 U. S. 168 and the cases cited therein. We think, however, that as the real substance of the plaintiffs' attack on the South Carolina Statute still consists of a vigorous assertion of its unconstitutionality, under the Federal Constitution, that we cannot say that no serious Constitutional question is present. It is true that some of the cases dealing with a situation where State Statutes regulating transportation have been superseded by a Federal Statute based on Federal control of Interstate Commerce that the Courts have said that no serious Constitutional question was involved. Typical of this class of cases is C. R. I. P. R. R. vs. Elevator Co., 57 Law Ed. page 285. But in these cases there is practically a concession on the part of the State enforcing agencies that the Federal Statute is paramount to and overrides the State Statute, the two statutes controlling the same subject matter. No such concession is made here by the State enforcing agencies, on the contrary the State contends that even if the "Motor Carrier Act of 1935" attempts to control "size" and "weight" that nevertheless, the State Statute is still Constitutional as a valid exercise of inherent police power. Without going extensively into the matter, we point out that the factual situation wherein police power is exerted over travel on highways owned and built by the State is not the same thing as police power exerted over commerce moving over railroads owned and operated by private companies, as the State does not surrender its contentions about

the validity of the State Statute, neither do the plaintiffs yield one inch in their contention as to the unconstitutionality of the Statute. As we view the case, both on application for interlocutory injunction and for trial on its final merits, it is essentially a question involving the constitutionality of a State Statute.

To attempt to draw an Order sustainable under Ex Parte [fol. 35] Hobbs is but to substitute sophistry and verbiage for logic and substance. Indeed when Ex Parte Hobbs is read carefully, we find that the injunction there granted by the one Judge was based entirely upon his construction of certain provisions of a State Statute. Such a situation is not at all presented here in the instant case.

But, if it is plain that a single District Judge cannot grant an interlocutory injunction where Section 380 is applicable, it is nevertheless plain that it is frequently his duty to grant an injunctive order of a less permanent nature, commonly called a temporary restraining order. The cases dealing with Section 380 make it plain that he has authority to preserve the status until the Court of Three Judges can be physically convened, and the hearing on the application for interlocutory injunction be had. In many cases the failure to grant such a restraining order would make a subsequent issuance of an interlocutory injunction an academic victory of no practical value. Therefore, we come to the question of whether we think we should grant such a temporary restraining order while the Three Judge Court is being convened and until the application is heard.

Testimony was taken before me which satisfies me that this Court should grant such a temporary restraining order here. Without reviewing this testimony at great length, it is sufficient to say that shippers more than carriers would suffer irreparable injury if the enforcement of this Statute was not temporarily restrained. Two major industries of South Carolina, the textile industry in the Piedmont and the trucking industry in the coastal regions, would I am satisfied suffer immediate and irreparable injury if drastic enforcement of this Statute were commenced on Monday morning, November 2, 1936. Surely the preservation of [fol. 36] the present status of control until the application for interlocutory injunction can be heard by a Court of higher dignity will do no serious harm and is the course which in my judgment should be followed. This temporary

restraining order, of course, will be effective only until the application for interlocutory injunction is heard and a ruling made thereon.

(Signed) J. Lyles Glenn, United States District Judge.

October 31, 1936.

[fol. 37] In United States District Court

Temporary Restraining Order—Filed November 2, 1936

This cause coming on to be heard upon the Bill of Complaint filed herein, upon the motion of the defendants to dismiss the Bill, upon the decree of this Court sustaining said motion in part and overruling said motion in part, and upon the written motion of the Plaintiffs for a Temporary Injunction against the defendants on the ground that Sections 4, 5, 6 and 7 of the Act of the General Assembly of South Carolina, 1933, No. 259, approved April 28, 1933 (38 Stats. 340), are superseded by the Motor Carrier Act, 1935, and upon motion of the plaintiffs for a Temporary Restraining Order pending the hearing of such application for interlocutory Injunction, and all parties, both plaintiffs and defendants, having appeared by Counsel, and the Court having heard the pleadings, the evidence taken in open court and the arguments of counsel on this the 30th day of October, 1936, and it appearing to the Court therefrom:

1. That the defendants herein have threatened and intend to commence rigid enforcement of the South Carolina Act involved in this suit on the 1st day of November, 1936, and

2, That it is impossible for a hearing and decision on the motion for a Temporary Injunction to be had prior to said date, and

3. That such threatened enforcement will cause immediate and irreparable loss and damage to the plaintiffs herein before such hearing and decision can be had, and, it [fol. 38] appearing meet and proper so to do, it is hereby Ordered, Adjudged and Decreed

That the defendants hereto, their officers, agents, servants, employees, attorneys, and all persons acting or attempting to act under or by virtue of their authority,

direction or control, and any person and every person acting or attempting to act under or by virtue of the authority of said Act of South Carolina, be and they are hereby

Enjoined and Restrained, until the further order of this Court, from in any way enforcing Sections 4, 5, 6 and 7 of the Act of the General Assembly of South Carolina, 1933, No. 259, approved April 28, 1933, (38 Stats. 340), said sections regulating respectively the weight, height, width and length of motor-trucks operating on the highways of South Carolina, against all persons, their agents, servants or employees operating motor vehicles in interstate commerce, into, from or across the State of South Carolina under authority of the Motor Carrier Act of 1935, from bringing or prosecuting any suit, action or proceedings, criminal or civil, to enforce the penalties provided in said Act, or to compel the compliance with said Act, or from doing any act or in any way interfering with the rights of such persons, their agents, servants or employees to conduct such operations in interstate commerce free from the limitations of said sections of such Act.

Provided, However, that said injunction is contingent upon the plaintiffs giving security in the sum of Ten Thousand Dollars ($10,000) covering damages to be sustained by defendants by reason of said injunction, such security to be approved by this Court and filed with the Clerk within three days from this date.

It is Further Ordered and Decreed that this temporary restraining order be, and the same is hereby continued until a Three Judge Court can be convened and pass upon the application for interlocutory injunction herein sought. The Three Judge Court herein referred to will be convened by a separate Order in keeping with Section 380, Title 28, U. S. C. A.

(Signed) J. Lyles Glenn, United States District Judge.

October 31, 1936.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER—Filed November 7, 1936

Come now the defendants in the above-entitled cause and for answer to the bill of complaint herein say:

1. Defendants deny any knowledge or information sufficient to form a belief as to the allegations of paragraph 1 of the bill.

2. Defendants admit the allegations of paragraph 2 of the bill.

3. On information and belief defendants deny the allegations of paragraph 3 of the bill.

4. Defendants deny the allegations of paragraph 4 of the bill.

5. Answering paragraph 5 of the bill, defendants admit that the General Assembly of South Carolina in 1933 enacted its Act No. 259, approved April 28, 1933 (38 Stats. 340) entitled "An Act to Regulate and Limit the Use of the Public Highways in the State by Motor Trucks, Semitrailers, and Trailers, * * *", etc., commonly known as the Motor Carrier Act of 1933, to which Act reference is hereby made for a true and complete statement of the terms, provisions, and effect thereof. Except as herein admitted, defendants deny the allegations of said paragraph 5.

6. Answering paragraph 9 of the bill, defendants admit that the United States Congress in August, 1935, passed [fol. 40] an Act entitled the "Motor Carrier Act, 1935", and that said Act was approved by the President on August 9, 1935, to which Act reference is hereby made for a true and complete statement of the terms, provisions, and effect thereof. On information and belief defendants admit that the State of South Carolina has nominated, and the Interstate Commerce Commission has appointed, Joint Board representatives for the State of South Carolina. Defendants admit on information and belief that the Interstate Commerce Commission did on July 1, 1936, promulgate proposed safety regulations, but defendants aver that said regulations contain no provisions affecting or in any way dealing with the size and weights of trucks or trailers. Defendants admit that the South Carolina Public Service Commission has refused, and is continuing to refuse, to issue operating licenses for equipment not complying with the limitations prescribed by the South Carolina Motor Carrier Act of 1933. Defendants admit that the officers and agents of said Public Service Commission, their deputies

and employees, have arrested, prosecuted, and caused to be fined agents, servants, and employees of certain of the plaintiffs, and will continue to arrest, prosecute, and cause to be fined such agents, servants, and employees of plaintiffs and others for failure to have such licenses. Defendants admit that defendants, and those for whom they are by this bill alleged to be represented, and their officers, deputies, agents, and employees have been enforcing, are enforcing, and will continue to enforce the provisions of said South Carolina Motor Carrier Act of 1933. Except as herein expressly admitted, defendants deny each and every allegation of said paragraph 9 of the bill.

7. Answering the separate subparagraphs of paragraph 10 of the bill of complaint:

(1) Defendants deny any information sufficient to form a belief as to the allegations of subparagraphs (1), (2), [fol. 41] (3), (4), (5), (6), and (7).

(2) Defendants deny the allegations of subparagraphs (8) and (9).

(3) Defendants deny any knowledge or information sufficient to form a belief as to the allegation in subparagraph (10) that the Merchants Fertilizer Company and the Planter's Fertilizer & Phosphate Company are, and were for many years prior to the passage of the South Carolina Motor Carrier Act of 1933, engaged in the manufacture and preparation of fertilizer and agricultural chemicals for serving communities with fertilizers in the states referred to. Defendants deny the other allegations of subparagraph (10).

(4) Defendants deny any knowledge or information sufficient to form a belief as to the allegations in subparagraph (11) that the South Carolina Produce Association, Inc., is, and was for many years prior to the passage of the South Carolina Motor Carrier Act of 1933, a profit-making cooperative marketing association incorporated by the State of South Carolina in accordance with the Federal and State cooperative marketing acts; that it has some two hundred members who are producers of vegetables and farm products in the State of South Carolina; and that it ships 75 per cent of such produce into interstate commerce. Defendants deny the other allegations of subparagraph (11).

(5) Defendants deny any knowledge or information sufficient to form a belief as to the allegations of subparagraph (12) that Sarah A. Geraty, John W. Geraty, and Charles W. Geraty, trading as William C. Geraty Company, are large and extensive producers of farm products in South Carolina and that such produce is shipped by motor carriers on the highways of South Carolina in interstate commerce. Defendants deny the other allegations of subparagraph (12).

(6) Defendants deny the allegations of subparagraph (13).

[fol. 42] 8. Answering paragraph 11 of the bill, defendants deny any knowledge or information sufficient to form a belief as to the allegation that each of the plaintiffs has made large investments of money, property, and effort in their respective businesses. Defendants deny the other allegations of paragraph 11.

9. Defendants deny the allegations of paragraph 12 of the bill.

10. Defendants deny the allegations of paragraph 13 of the bill.

11. For a separate and distinct defense defendants allege that if contrary to its true intent and construction the Federal Motor Carrier Act of 1935 should be construed to supersede the provisions of the South Carolina Motor Carrier Act of 1933 regulating sizes and weights of motor vehicles engaged in interstate commerce upon the highways of the State of South Carolina, the Act as so construed is beyond the power of Congress under the Commerce Clause and in violation of the Tenth Amendment to the Constitution of the United States.

And now having fully answered, defendants deny that plaintiffs are entitled to the relief prayed for in the bill of complaint, or to any part thereof, or to any other relief against these defendants, and pray that the bill of complaint be dismissed with costs.

John M. Daniel, Attorney General; J. Ivey Humphrey, Assistant Attorney General; M. J. Hough, Assistant Attorney General; Blease & Griffith, Counsel for Defendants.

(Answer verified.)

[fol. 43] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER CONVENING THREE-JUDGE COURT—Filed November 13, 1936

On August 11, 1936 the complainants above named filed their Bill in this Court seeking a Permanent Injunction against the defendants. At that time threatened enforcement of the State Statute which the complainants contend is unconstitutional was not imminent. But, before the case could be called up for trial on its merits, the state agencies threatened to enforce the alleged unconstitutional Statute. The complainants then made motion for a Temporary Restraining Order, which this Court in its Memorandum Opinion of October 31, 1936, construed as being in substance a motion for Interlocutory Injunction. It appearing that by reason of this application for Interlocutory Injunction, the hearing should be had before a specially constituted Court of Three Judges as provided for by the terms of Section 380, Title 28 U. S. C. A., Section 266 United States Judicial Code, now, therefore, it is

Ordered and Adjudged that the Honorable John J. Parker, United States Circuit Judge, and the Honorable Elliott Northcott, United States Circuit Judge be, and they are hereby called to the assistance of the undersigned District Judge to hear and determine the application for Interlocutory Injunction and other matters arising in the above-entitled suit in Equity. That the Court as thus constituted be the Court to hear and determine the matters involved in this suit.

J. Lyles Glenn, United States District Judge.

November 12, 1936.

[fol. 44] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF INTERSTATE COMMERCE COMMISSION TO INTERVENE AS A PLAINTIFF—Filed November 17, 1936

To the Honorable Judges of the Above Named Court:

Now comes the Interstate Commerce Commission and petitions the court for leave to intervene in the above-

entitled cause as a party plaintiff and prays that upon granting of such leave this petition be permitted to stand as its bill in intervention, and as grounds for its intervention it respectfully shows:

1. That it is an administrative tribunal duly constituted and organized under the laws of the United States with power to sue and be sued.

2. That under the pleadings and proceedings heretofore had in the cause there are placed in litigation questions: (1) as to whether Congress by the enactment of "The Motor Carrier Act, 1935" (Act of August 9, 1935, 49 Stat. L. 543) has purported to so enter the field of regulation of interstate transportation by motor carriers as to exclude the power of the State of South Carolina lawfully to enact and enforce a statute approved April 28, 1933 (38 Stat. 340), so far as the same restricts as to weight, height, size, safety and qualifications of drivers, the use of motor vehicles operating in interstate commerce on the highways [fol. 45] of the state, and (2) if such Federal legislation purports to so enter the field of regulation of interstate transportation by motor carriers, whether such legislation is constitutionally valid.

3. That your petitioner is interested in the matters in litigation by reason of the fact that it is the agency of the Federal government charged with primary responsibility for the administration and enforcement of the provisions of the said Motor Carrier Act, 1935, and that as such it should be permitted to appear as a party plaintiff in support and defense of the powers lawfully committed to it, which are challenged in the pleadings herein filed in behalf of the defendants.

4. That the plaintiff adopts the allegations of the bill of complaint contained in that part of sub-section 9 of Section III from the beginning thereof up to the semi-colon preceding the last line on page 10 of the bill of complaint, and such parts of sub-section 9 thereafter as allege that the defendants have undertaken to enforce and, unless restrained, will continue to enforce the provisions of the said statute of South Carolina.

5. That the enforcement of such provisions of the South Carolina statute, unless restrained, will interfere with, and

prevent the exercise by your petitioner of an exclusive function of the Federal Government lawfully committed to it by a statute of the United States.

6. That this application for intervention is made with the consent of the plaintiffs in this cause.

7. That the petitioner joins in the prayer for relief as set out in the bill of complaint herein.

Interstate Commerce Commission, by Edward M. Reidy, Assistant Chief Counsel. Thomas M. Ross, Attorney. Daniel W. Knowlton, Chief Counsel, of Counsel.

(Petition verified.)

[fol. 46] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS COMPLAINT—Filed November 24, 1936

Now come the defendants and move the Court to dismiss the bill of complaint and paragraph 9 of Section III thereof upon the following grounds:

1. The bill of complaint and paragraph 9 of Section III thereof fail to state a cause of action in Equity entitling the plaintiffs to the relief prayed.

2. The bill of complaint and paragraph 9 of Section III thereof should be stricken as a matter of law, in that they state as a cause of action that Sections 3, 4, 5, 6 and 7 of the South Carolina Act approved April 28, 1933, regulating and limiting the size and weight of motor trucks and semi-trailers on South Carolina highways, have been entirely and completely superseded by the Act of Congress known as "Motor Carrier Act, 1935", whereas said Act of Congress shows upon its face that Congress has not regulated the size and weight of such motor carriers.

John M. Daniel, Attorney General; J. Ivey Humphrey, Assistant Attorney General; M. J. Hough, Assistant Attorney General; Blease & Griffith, Counsel for Defendants.

[fol. 47] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF RECEIVERS OF SEABOARD AIR LINE RAILWAY TO INTERVENE AS DEFENDANTS—Filed November 24, 1936

To the Honorable Judges of the Above-Named Court:

Now come Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the properties and assets of Seaboard Air Line Railway Company, and petition the Court for leave to intervene in the above-entitled cause as parties defendant and pray that upon the granting of such leave this petition be permitted to stand as their bill of intervention, and as grounds for their intervention they respectfully show:

1. That petitioners are citizens and residents of the State of Virginia and are the duly qualified and acting Receivers of the properties and assets of Seaboard Air Line Railway [fol. 48] Company, a corporation of Virginia and other states. By orders dated December 23, 1930, the District Courts of the United States for the Eastern District of Virginia and the Southern District of Florida appointed Legh R. Powell, Jr., and Ethelbert W. Smith as Receivers of the properties and assets of Seaboard Air Line Railway Company. Ethelbert W. Smith resigned as Receiver, effective December 31, 1932, and by orders of this last mentioned date, entered by the two aforesaid Courts, Henry W. Anderson was appointed Receiver in his place. Both the primary and ancillary receivership proceedings in which the Receivers were appointed are still pending in the said Courts, the primary proceedings being in the Virginia Court and the ancillary proceedings being in the Florida Court. In compliance with Section 56 of the Judicial Code of the United States certified copies of the bills and orders of the appointment of said Receivers have been filed in the Clerk's Office of this honorable Court and in the Courts of each District of the Circuit in which any portion of the property of Seaboard Air Line Railway Company is situated.

2. That the petitioners, as such Receivers, are engaged in interstate commerce in South Carolina and other states and operate lines of railroad in that state and other states subject to the Act to Regulate Commerce.

3. That the plaintiffs are competing carriers of freight and passengers and operate motor vehicles over the public highways of the State of South Carolina.

4. That the South Carolina statute assailed in the plaintiffs' bill was enacted to regulate motor vehicles traversing [fol. 49] the highways of South Carolina, including those engaged in interstate commerce, and particularly to prescribe the maximum weights and sizes of such motor vehicles operating over the South Carolina highways.

5. That the petitioners have the lawful right to insist that all motor vehicles, including those engaged in interstate commerce, operating over the public highways of South Carolina, operate in compliance with the South Carolina laws, and particularly those prescribing the maximum weights and sizes, and that the petitioners have the further lawful right to enjoin the non-compliance with such statutory requirements.

6. Petitioners aver that if motor vehicles, and particularly those of the plaintiffs, be permitted to operate upon, along and over the public highways of South Carolina in defiance of the requirements of the South Carolina statute, including those provisions prescribing maximum weights and sizes, your petitioners will be wrongfully and unlawfully subjected to unfair competition in that such larger and heavier motor vehicles of the plaintiffs will have the capacity to carry, and doubtless will carry, greater quantities of freight and a larger number of passengers in contravention and impairment of the franchise rights of your petitioners as common carriers by rail in South Carolina, and thereby wrongfully and unlawfully deprive your petitioners of vast amounts of revenue to which they are entitled and would otherwise receive.

[fol. 50] 7. Petitioners further say that if the plaintiffs be permitted to operate over the public highways of South Carolina motor vehicles of the sizes and weights which the plaintiffs are asserting in this suit they have the right to operate the inevitable result will be the very rapid deterioration of the public highways and the bridges constituting links in such highways—in many instances amounting to virtual destruction of such highways and bridges, and in consequence thereof your petitioners, as large taxpayers in the State of South Carolina, will be assessed with and be

required to pay large sums in taxes in excess of the amounts they would be required to pay if the unlawful operations of the plaintiffs be not permitted.

8. That the plaintiffs herein are wrongfully asserting that the South Carolina statute involved in these proceedings has been superseded by an Act of Congress of August 9, 1935, known as "The Motor Carrier Act, 1935", whereas the truth is that the said Act of Congress neither purports to supersede, nor does it have the effect of superseding, the South Carolina statute involved in this suit in so far as weights and sizes of motor vehicles are concerned, but the said South Carolina Act is now in full force and effect with respect to such weights and sizes, anything in the said Act of Congress notwithstanding.

Wherefore your petitioners say that they have a vital legal interest in this litigation and they therefore pray that [fol. 51] they be permitted to intervene in this suit and be made parties defendant thereto and that they be granted the same relief for which the defendants have asked in their pleadings heretofore filed and for such other and further relief as the Court may deem proper.

Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of the Properties and Assets of Seaboard Air Line Railway Company, by J. B. S. Lyles, Attorney.

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF ATLANTIC COAST LINE RAILROAD COMPANY AND CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY TO INTERVENE AS DEFENDANTS—Filed November 25, 1936

To the Honorable Judges of the Above-Named Court:

Now come Atlantic Coast Line Railroad Company and Charleston & Western Carolina Railway Company, and petition the Court for leave to intervene in the above entitled cause as parties defendant and pray that upon the granting of such leave this petition be permitted to stand as their bill of intervention, and as grounds for their intervention they respectfully show:

1. That the petitioner Atlantic Coast Line Railroad Company is now, and was at the times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Virginia, owning properties and operating as a common carrier by railroad in the State of Virginia, in the State of South Carolina and other states, and being engaged in interstate commerce in South Carolina [fol. 53] and other states and subject to the Act to regulate commerce.

2. That the petitioner Charleston & Western Carolina Railway Company is now, and was at the times hereinafter mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of South Carolina, owning properties and operating as a common carrier by railroad in the States of South Carolina and Georgia, and being engaged in interstate commerce in said states.

3. That the plaintiffs are competing carriers of freight and passengers and operate motor vehicles over the public highways of the State of South Carolina.

4. That the South Carolina statute assailed in the plaintiffs' bill was enacted to regulate motor vehicles traversing the highways of South Carolina, including those engaged in interstate commerce, and particularly to prescribe the maximum weights and sizes of such motor vehicles operating over the South Carolina highways.

5. That the petitioners have the lawful right to insist that all motor vehicles, including those engaged in interstate commerce, operating over the public highways of South Carolina, operate in compliance with the South Carolina laws, and particularly those prescribing the maximum weights and sizes, and that the petitioners have the further lawful right to enjoin the non-compliance with such statutory requirements.

6. Petitioners aver that if motor vehicles, and particularly those of the plaintiffs, be permitted to operate upon, along and over the public highways of South Carolina in defiance of the requirements of the South Carolina statute, including those provisions prescribing maximum weights and sizes, your petitioners will be wrongfully and unlawfully subjected to unfair competition in that such larger and heavier [fol. 54] motor vehicles of the plaintiffs will have the

capacity to carry, and doubtless will carry, greater quantities of freight and a larger number of passengers in contravention and impairment of the franchise rights of your petitioners as common carriers by rail in South Carolina, and thereby wrongfully and unlawfully deprive your petitioners of vast amounts of revenue to which they are entitled and would otherwise receive.

7. Petitioners further say that if the plaintiffs be permitted to operate over the public highways of South Carolina motor vehicles of the sizes and weights which the plaintiffs are asserting in this suit they have the right to operate the inevitable result will be the very rapid deterioration of the public highways and the bridges constituting links in such highways—in many instances amounting to virtual destruction of such highways and bridges, and in consequence thereof your petitioners, as large taxpayers in the State of South Carolina, will be assessed with and be required to pay large sums in taxes in excess of the amounts they would be required to pay if the unlawful operations of the plaintiffs be not permitted.

8. That the plaintiffs herein are wrongfully asserting that the South Carolina statute involved in these proceedings has been superseded by an Act of Congress of August 9, 1935, known as "The Motor Carrier Act, 1935", whereas the truth is that the said Act of Congress neither purports to supersede, nor does it have the effect of superseding, the South Carolina statute involved in this suit in so far as weights and sizes of motor vehicles are concerned, but the said South Carolina Act is now in full force and effect with respect to such weights and sizes, anything in the said Act of Congress notwithstanding.

[fol. 55] Wherefore, your petitioners represent that they have a vital legal interest in this litigation and they therefore pray that they be permitted to intervene in this suit and be made parties defendant thereto and that they be granted the same relief for which the defendants have asked in their pleadings heretofore filed and for such other and further relief as the Court may deem proper.

Atlantic Coast Line Railroad Company and Charleston & Western Carolina Railway Company, by Thos. W. Davis, Douglas McKay, M. G. McDonald, Attorneys.

[fol. 56] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER PERMITTING INTERSTATE COMMERCE COMMISSION TO INTERVENE—Filed November 30, 1936

Upon consideration of the Motion and Petition of Interstate Commerce Commission for leave to intervene as a party plaintiff in this cause.

It is Ordered That Interstate Commerce Commission be and hereby is permitted to intervene as a party plaintiff and to appear and otherwise participate at the proceedings.

It is Further Ordered That its petition for intervention stand as its Bill of Intervention in the cause, and that Answers of the several defendants heretofore filed stand as their Answers to such Bill of Intervention.

John J. Parker, U. S. Circuit Judge. Elliott Northcott, U. S. Circuit Judge. J. Lyles Glenn, U. S. District Judge.

November 30th, 1936.

[fol. 57] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF MARLBORO PRODUCE ASSOCIATION TO INTERVENE AS A PLAINTIFF—Filed December 1, 1936

To the Honorable Judges of the Above-Named Court:

Now comes Marlboro Produce Association and petitions the Court for leave to intervene in the above entitled cause as a party plaintiff and prays that upon granting of such leave this petition be permitted to stand as its Bill of Intervention, and as grounds for its intervention it respectfully shows:

1. That it is a voluntary association of farmers engaging in cooperatively and with the assistance of the County of Marlboro, in marketing for its individual members farm products raised in the County of Marlboro, State of South Carolina, Northern markets through Inter State Commerce.

That at an expense of approximately fifteen hundred dollars paid through taxation by Marlboro County and an ap-

proximate like expense paid by the United States Government, through its Public Works Administration, there has been built near Bennettsville, the County Seat of said County and State, a large market building where the individual farmers of said county bring for transportation to markets in other States their farm produce; that this Association brought into the County only this year considerable sums of money through its cooperative efforts for the sale of farm products to other states, and is rapidly growing in business and financial assistance to numerous growers of the County.

[fol. 58] 2. That under the pleadings and proceedings heretofore had in the case there are placed in litigation questions: (1) as to whether Congress by the enactment of "The Motor Carrier Act, 1935" (Act of August 9, 1935, 49 Stat. L. 543) has purported to so enter the field of regulation of interstate transportation by motor carriers as to exclude the power of the State of South Carolina lawfully to enact and enforce a statute approved April 28, 1935 (38 Stat. 340), so far as the same restricts as to weight, height, size, safety and qualifications of drivers, the use of motor vehicles operating in interstate commerce on the highways of the state, and (2) if such Federal legislation purports to so enter the field of regulation of interstate transportation by motor carriers, whether such legislation is constitutionally valid.

3. That your petitioner is interested in the matter in litigation by reason of the fact that it is an Agency for large numbers of farmers and the sale of whose products through this agency is primarily dependent upon motor transportation which will be practically ruined and its growth prevented, should the Act of the legislature mentioned drafted in the Plaintiffs' Bill of Complaint herein be permitted to stand.

4. That the plaintiff adopts the allegation of the Bill of Complaint contained in that part of sub-section 9 of Section III from the beginning thereof up to the semi-colon preceding the last line on page 10 of the bill of complaint, and such parts of sub-section 9 thereafter as allege that the defendants have undertaken to enforce and, unless restrained, will continue to enforce the provisions of the said statute of South Carolina.

5. That this application for intervention is made with the consent of the plaintiffs in this cause.

6. That the petitioner joins in the prayer for relief as set out in the bill of complaint herein.

Marlboro Produce Association, by Tison & Miller, attorney and chief counsel.

(Petition verified.)

[fol. 59] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION OF A. J. MATTHESON, INC., TO INTERVENE AS PLAINTIFF—Filed December 1, 1936

To the Honorable Judges of the Above-Named Court:

Now comes A. J. Mattheson, Inc., and petitions the court for leave to intervene in the above *tne*itled cause as a party plaintiff and prays that upon granting of such leave this petition be permitted to stand as its Bill of Intervension, and as grounds for its intervention it respectfully shows:

1. That it is a corporation chartered and existing under and by the laws of the State of South Carolina, engaged in buying through channels of interstate commerce gasolene, kerosene, and oils, which products it then sells exclusively to dealers who in turn retail said products to trucks and motor vehicles engaged in intra and inter state business.

That approximately 65% of your petitioner's business consists of resales by its dealers to trucks engated in interstate business, the weight and size of which trucks when loaded as customary for the trade exceeds the width and size as specified in Act #259 of the General Assembly *if* South Carolina for the year 1933; as, also, are the trucks delivering the products above named for distribution.

2. That at an expense of many thousands of dollars your petitioner has bought property, erected buildings, and equipped the same with modern equipment through the past number of years for the furnishing of the above named products to its dealers to be sold in interstate business, and its business is so built around the modern custom and [fol. 60] necessities of motor transportation by trucks that

would exceed the weight and size as specified in the Act above stated, as to cause the enforcement of said Act to practically ruin its business and to put a number of people out of employment now engaged by and through the activities of this intervening petitioner.

2. That under the pleadings and proceedings heretofore had in the cause there are placed in litigation questions: (1) as to whether Congress by the enactment of "The Motor Carrier Act, 1935" (Act of August 9, 1935, 49 Stat. 543) has purported to so enter the field of regulation of interstate transportation by motor carriers as to exclude the power of the State of South Carolina lawfully to enact and enforce a statute approved April 28, 1935 (38 Stat. 340), so far as the same restricts as to weight, height, size, safety and qualifications of drivers, the use of motor vehicles operating in interstate commerce on the highways of the state, and (2) if such Federal legislation purports to so enter the field of regulation of interstate transportation by motor carriers, whether such legislation is constitutionally valid.

3. That your petitioner is interested in the matter in litigation by reason of the facts before stated, and, that its business is primarily dependent upon motor transportation through the State of South Carolina, which will be practically prevented as to motor trucks hauling freight, should the Act of the legislature before mentioned be held lawful.

4. That the plaintiff adopts the allegation of the Bill of Complaint contained in that part of sub-section 9 of Section III from the beginning thereof up to the semi-colon preceding the last line on page 10 of the bill of complaint, and such parts of sub-section 9 thereafter as allege that the defendants have undertaken to enforce and, unless restrained, will continue to enforce the provisions of the said statute of South Carolina.

5. That this application for intervention is made with the consent of the plaintiffs in this cause.

6. That the petitioner joins in the prayer for relief as set out in the bill of complaint herein.

A. J. Motheson, Inc., by Tison & Miller, Attorney and Chief Counsel.

(Petition verified.)

[fol. 61] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER PERMITTING RECEIVERS OF SEABOARD AIR LINE RAILWAY, ATLANTIC COAST LINE RAILROAD COMPANY, AND CHARLESTON AND WESTERN CAROLINA RAILWAY COMPANY TO INTERVENE AND ADOPT DEFENDANTS' ANSWER—Filed December 2, 1936

It is Ordered That the motions for intervention by the Receivers of Seaboard Air Line Railway Company, Atlantic Coast Line Railroad Company and Charleston & Western Carolina Railway Company be allowed as of November 30, 1936, and that said interveners be permitted to adopt as their pleadings in the suit the motions to dismiss and the answer of the original defendants.

John J. Parker, Senior Circuit Judge Presiding.

December 2, 1936.

[fol. 62] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING MARLBORO PRODUCE ASSOCIATION AND A. J. MATTHESON, INC., TO INTERVENE AND ADOPT PLAINTIFFS' COMPLAINT—Filed December 3, 1936

Upon consideration of the motion and petition of Marlboro Produce Association and A. J. Matheson, Inc., for leave to intervene as parties plaintiff in this cause;

It is Ordered That Marlboro Produce Association and A. J. Matheson, Inc., be and each hereby is permitted to intervene as a party plaintiff and to appear and otherwise participate at the proceedings.

It is Further Ordered that petition for intervention of each stands as its Bill of Intervention in the cause, and that answers of the several defendants heretofore filed stand as their answers to such Bill of Intervention.

John J. Parker, U. S. Circuit Judge. Elliott Northcott, U. S. Circuit Judge. J. Lyles Glenn, U. S. District Judge.

December 2, 1936.

[fol. 63] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION—Filed January 20, 1937

On Final Hearing.

(Argued November 30, 1936. Decided —— —, ——.)

Before Parker and Northcott, Circuit Judges, and Glenn, District Judge.

S. King Funkhouser, J. Ninian Beall (S. King Funkhouser, J. Ninian Beall and Frank Coleman on brief) for plaintiffs; John M. Daniel, J. Ivey Humphrey, M. J. Hough, Eugene S. Blease and Steve C. Griffith for Defendants; Thomas W. Davis and Douglas McKay for Atlantic Coast Line Railway Company, Intervenor; J. B. S. Lyles for Seaboard Air Line Railway, Intervenor; M. G. McDonald for C. & W. C. Railway Company, Intervenor; E. M. Reidy and Thomas M. Ross for Interstate Commerce Commission, Intervenor; and John E. Benton, as amicus curiæ.

[fol. 64] PARKER, Circuit Judge:

This is a suit to enjoin the enforcement against trucks which are being operated in interstate commerce of the provisions of Sections 3, 4, 5, 6, and 7, relating to size and weight, of Act No. 259 of the General Assembly of South Carolina, approved April 28, 1933, 38 Stats. 340. The plaintiffs are either corporations engaged in operating truck lines in interstate commerce or persons or corporations engaged in shipping produce or merchandise by truck in interstate commerce. The defendants are the various officials of the State of South Carolina who are charged with the duty of enforcing the act. Intervention has been allowed on the part of one shipper, who was not a party to the original bill, and of certain railroad companies, who are interested in seeing the act enforced, on the ground that enforcement thereof will free them of competition based on violation of law. The Interstate Commerce Commission also has been allowed to intervene.

The bill as originally filed did not ask for interlocutory injunction, and a motion to dismiss was heard by the district

judge and was allowed as to the allegations of the bill which merely alleged violation of the due process and equal protection clauses of the 14th Amendment and generally that the provision of the act constituted a burden on interstate commerce, but was disallowed as to allegations that the act constituted a regulation of interstate commerce with respect to matters covered by the motor carriers act of 1935. The plaintiffs thereupon asked for an interlocutory injunction forbidding the enforcement of the act pending a final hearing, and the judge granted a temporary restraining order and convened a court of three judges pursuant to [fol. 65] Section 266 of the Judicial Code (U. S. C. A. 380). At the hearing before this court of three judges, it was decided to reconsider all the questions raised by the bill and answer and give judgment thereon in order that all matters involved in the litigation might be disposed of promptly and heard on one appeal. None of the parties objected to this course, but on the contrary expressed a desire that action be taken which would expedite the final decision of the cause. In our opinion, there could be no valid objection to this course, as the court of three judges could unquestionably permit an amendment of the bill before it, and could permit the plaintiffs to reintroduce, by such amendment, such portions of the bill as had been stricken on the motion to dismiss; and this, in effect, was what was done. It was thereupon agreed that upon the evidence to be presented the cause would be submitted for final decree by the court, and not merely in support of the application for interlocutory injunction; and the court has heard the parties fully, the evidence being directed to whether the size and weight provisions of the statute complained of constitute an unreasonable burden upon interstate commerce.

The statute in effect in South Carolina prior to the passage of the act complained of was Act No. 685, Laws of 1930 (36 Stats. 1192). It prescribed a gross weight for single vehicles of 25,000 pounds, with a maximum axle load of 10,000 pounds, and a maximum weight of any combination of vehicles of 40,000 pounds. The act of 1933 limited the gross weight of any vehicle to 20,000 pounds and provided that any "tractor (or motor propelled truck), together with the semi-trailer" should "be considered one unit", so that a limitation of 20,000 pounds was put on the tractor-semi-[fol. 66] trailer unit, as to which a maximum weight of 40,-

000 pounds had been allowed under the preceding law. Both the 1930 Act and the Act of 1933 contain provisions limiting the width of trucks to 90 inches. The bill attacks these three provisions of the Act, viz: (1) the one limiting the gross weight of single trucks to 20,000 pounds; (2) the one providing that a tractor-semi-trailer shall be considered a single unit for the purpose of determining weight and thereby limiting the weight of such combination to 20,000 pounds; and (3) the one limiting width to 90 inches. The attack is made on three grounds: (1) that the provisions of the act in question are in violation of the 14th Amendment in that "they constitute an unreasonable, arbitrary and capricious interference with the rights of plaintiffs to use the highways in a reasonable manner and for a lawful purpose"; (2) that they have been superseded by the federal Motor Carriers Act of 1935; and (3) that they constitute an unreasonable burden upon interstate commerce.

Little need be said as to the first ground of attack, i. e. that the statute is violative of the 14th Amendment. This is sufficiently dealt with by the Supreme Court of South Carolina in the case of State v. John P. Nutt Co., — S. C. —, 185 S. E. 25, Cert. denied — U. S. —; and there is no occasion to add anything to what is there said as to this aspect of the case. We agree with the conclusion there reached on this point.

And we are not impressed with the second ground of attack, i. e. that the provisions of the statute have been superseded as a result of the enactment of the Motor Carriers Act of 1935. It is not necessary to inquire into the power of Congress to regulate the size and weight of vehicles used in interstate commerce on the roads of the several states or into the limitations upon that power; for we think it perfectly clear that in the Motor Carriers Act Congress did not [fol. 67] attempt to exercise such power, but, on the contrary, expressly refrained from exercising it. Section 225 of that Act provides (49 U. S. C. A. 325):

"The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of

all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter."

Reliance is placed upon Section 202a (49 U. S. C. A. 302a) declaring the purpose of the act, and particularly upon Section 204a (1) (2) and (3) (49 U. S. C. A. 304a) (1), (2) and (3), defining the powers of the Commission, which are as follows:

"202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this chapter.

"204. (a) Powers and duties generally. It shall be the duty of the Commission

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uni- [fol. 68] form systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment."

It is argued that authority in the Commission to control size and weight of motor vehicles is to be found in the provisions of Section 204, subsections a(1) and a(2), authorizing the Commission to establish reasonable requirements with respect to "safety of operation and equipment" in the case of common and contract carriers, and in the provision of subsection a(3) authorizing "standards of equipment" to be prescribed for private carriers. The presumption is hardly to be indulged that Congress intended to include size and weight in "safety of operation and equipment" or "standards of equipment", as to which the Commission was given full power of regulation, when by Section 225, size and weight were specifically dealt with and the Commission was authorized merely to investigate as to these and report on the need of regulation. The rule of statutory interpretation is well settled that "general language of a statutory provision, although broad enough to include it, will not be held to apply a matter specifically dealt with in another part of the same enactment • • •. Specific terms prevail over the general in the same or another statute which might otherwise be controlling." Ginsberg & Son v. Popkin, 285 U. S. 204, 208; Kepner v. United States, 195 U. S. 100, 125; United States v. Chase, 135 U. S. 255, 260. In the case last cited the rule is thus stated:

[fol. 69] "It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' Pretty v. Solly, 26 Beavan, 610, per Romilly, M. R.; State v. Com'rs of Railroad Taxation, 37 N. J. Law, 228. This rule applies wherever an act contains general provisions and also special ones upon a subject,

which, standing alone, the general provisions would include. Endlich on the Interpretation of Statutes, 560."

Indeed, it would be only by a strained construction of language that the provision authorizing the commission to establish requirements with respect to safety of equipment or standards of equipment could be held to confer power to regulate size and weight of vehicles. Safety of equipment and standards of equipment as applied to vehicles moving in interstate commerce are expressions which naturally have reference to safety with respect to commerce or persons engaged therein over which Congress has undoubted jurisdiction, whereas size and weight are matters which relate chiefly to the safety and preservation of highways, as to which jurisdiction resides primarily in the several states. And it is worthy of note that the regulation of size and weight is treated by road authorities quite generally as a matter altogether different from the regulation of equipment. Thus, in the proposed Uniform Act Regulating Traffic and Highways, as redrafted in 1934 by the National Conference on Street and Highway Safety, of which the Secretary of Commerce was Chairman, in cooperation with the National Conference of Commissioners on Uniform State Laws, published by the Bureau of Public Roads of the Department of Agriculture, equipment is dealt with in an entirely separate chapter from size, weight and load. Chapter 15 of the proposed act deals with equipment and regulates such matters as lights, brakes, horns, mufflers, mirrors, wind-[fol. 70] shields, safety glass, inspection of equipment, etc. Chapter 16 deals with width, height and length of vehicles, use of trailers, wheel and axle loads, gross loads etc. The Commission itself has construed the act as not imposing upon it the duty of regulating size and weight; for it has caused its Bureau of Motor Carriers to draft proposed safety regulations to be prescribed by it under the sections of the act which we have quoted, and these proposed safety regulations have no reference to size or weight of vehicles but are addressed to such matters as "lighting devices and reflectors," "safety glass," "brakes" and "Miscellaneous parts and accessories."

If there were any doubt as to the meaning of the act in this respect, and we are not to be understood as implying that we think that there is, the history of the legisla-

tion would conclusively demonstrate that it was not the intention of Congress to give to the Commission the power to regulate size and weight. The act was the legislative result of studies made by the Coordinator of Transportation under Congressional authority. In his report to the 73d Congress, 2d session (Senate Document No. 152), the Coordinator called attention in detail to state legislation regulating size and weight (pp. 206, 207), referred to the feeling that varying traffic, topographic and financial conditions in the different states warranted diversity of weight limitations (pp. 213-214), and with respect to the provision of the bill said (p. 45):

"Section 325 of the proposed bill authorizes the Commission to investigate and report to Congress upon the need for Federal regulation of the sizes and weights of all motor vehicles operating in interstate and foreign commerce, and of the qualifications and maximum hours of service of employees, this investigation to cover private as well as for-hire carriers. The Rayburn bill contains no provision respecting these matters except that it provides for regu- [fol. 71] lation of the qualifications and hours of service of the employees of common and contract carriers. While the inquiry made by the coordinator's staff indicates a possible need for these forms of Federal regulation, the subject is one which may appropriately be postponed for future consideration."

In the hearing before the Committee on Interstate Commerce of the Senate, Coodinator Eastman said (at p. 92 of hearing on S-1629, 74th Congress):

"In answer to one of your questions I started to say something about the regulations with respect to the sizes and weights of vehicles. It is true that by drastic and unreasonable regulations of that character one State might interfere with interstate commerce and prevent the reasonable operation of vehicles in interstate commerce. We do not undertake in this bill to cover that situation, except to provide for a thorough investigation of it by the Commission, with recommendations to Congress, because there is involved there not only a question of fact as to what the regulation should be but also as to how far the Federal Government has power to interfere with the exercise of the

police power by the States with respect to the use of their highways."

The act as originally introduced dealt with qualifications and maximum hours of service of employees, as well as with size and weight, only in section 225. It was amended during its passage, however, so as to give the Commission authority to regulate "qualifications and maximum hours of service of employees," these words being inserted in subsections 1 and 2 of section 204a and an additional subsection as to private carriers (being subsection 3 of 204a) being added. The fact that the section prescribing the powers of the Commission were thus amended to include a part of what was already covered by Section 225, while the remainder of what was covered by that section, i. e. size and weight, were not included in the amendment, raises a strong presumption that it was not the intention of Congress that the Commission should be given regulatory power over these. The report of the Senate Committee to which the brief of the Commission refers, in saying "Such an investigation is still authorized (Sec. 225), but if the Commission determines after investigation that there is [fol. 72] need for such regulation, it may impose reasonable requirements without further legislation", has reference to the investigation as to need for regulation of qualifications and maximum hours of service of employees, and not to the investigation authorized as to need of regulation of size and weight of vehicles.

The Commission makes an argument based upon the rejection by the Senate of an amendment offered by Senator Duffy which provided in part "* * * That the laws enacted in any state and regulations thereunder that relate to the maintenance, protection, safety or use of the highways therein, which do not discriminate against motor vehicles used in interstate commerce, shall not be deemed to be a burden on or an obstruction or impediment to interstate commerce, and the power to enact such laws and promulgate such regulations thereunder is hereby expressly recognized and confirmed to the respective states." The answer to this is that the effect of the incorporation of the language quoted in the statute would have been to sanction state regulations of size and weight even though these might amount to an unreasonable interference with inter-

state commerce and be void for that reason in the absence of Congressional approval.

To sum up on this feature of the case, we do not think that there is anything in the language or in the history of the act which shows an intention on the part of Congress to regulate the size and weight of vehicles; and it is unreasonable to think that Congress would intend, by vague general language, to clothe the Commission with power to regulate a matter of such difficulty in which detailed regulations had already been prescribed by all of the 48 states, and thereby strike down all state regulations affecting the matter and leave the subject unregulated until such time [fol. 73] as the Commission might act. Our conclusion as to the proper interpretation of the Act is supported by the following recent decisions. L. & L. Freight Lines et al. vs. Railroad Commission of Florida (D. C. Fla.) — Fed. Supp. —, Lowe v. Stoutamire, — Fla. —, 166 Sou. 310; Railroad Com. v. Southwestern Greyhound Lines (Tex. Civ. App.), 92 S. W. (2d) 296. In the case first cited, Judge Strum well said:

"It is significant, and worthy of particular note, that the regulation of 'weights' of such motor vehicles,—obviously a most important element of regulation,—was not included amongst the matters specifically enumerated in Sec. 204 (a)(1). The Act contains no express or specific regulation, nor authority to regulate, motor carriers as to size or weights. If such authority is to be found in the Act it must be spelled out either from the general language 'to regulate common carriers by motor vehicle,' or by interpretation of the terms 'safety of operation and equipment.'

"The argument that such authority is to be found in the quoted phrases is refuted by the specific provisions of Sec. 225 of the Act (49 U. S. C. A. 325) that 'the Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weights of motor vehicles and combinations of motor vehicles * * *'. It should be noted that this section does not provide that the Commission shall determine by investigation what the sizes and weights of motor vehicles should be, and thereupon to adopt regulations to put the same into effect. The authority is merely to 'investigate and report on' the 'need' for Federal regulation of sizes and weights,—a wholly pro-

spective matter, clearly indicating an absence of intent to presently regulate in that respect. If Congress intended to presently regulate in respect of sizes and weights, but desired the Commission to first determine by investigation what the regulations should be and thereafter put the same into effect, more apt language to that end would have, no doubt, been used. Sec. 204 of the Act specifically enumerates practically every aspect of regulation, except as to sizes and weights. The language of Sec. 225 of the Act makes it quite clear that the omission of sizes and weights was no mere oversight, but was deliberate. When that omission is viewed in connection with the language of Section 225 of the Act authorizing the Commission to investigate and 'report on' the 'need' for Federal regulation of sizes and weights,—not to determine what such regulations shall be, nor to put any such regulation in effect, but merely to 'report,'—the conclusion is inescapable that Congress intended to withhold regulation in that respect until some future time."

We come, then, to the third ground of attack upon the [fol. 74] statutory regulations complained of, viz., that they constitute an unreasonable burden upon interstate commerce; and we think that the contention of plaintiffs as to this must be sustained in so far as applied to the operation of trucks upon the standard concrete highways of the state and those highways which constitute the great arteries of interstate commerce, even though short stretches of them are not of standard construction, i. e. federal highways 1, 15-A, 17, 21, 25, 29 and 52. We think it an unreasonable burden upon interstate commerce to apply the 20,000 pound gross load limitation, or the statutory rule requiring that the tractor-semi-trailer combination be considered as one vehicle for the purpose of applying the gross load limitation, or the 90 inch width limitation to trucks which do not exceed 96 inches in width, using the standard concrete highways of the state. As the great arteries of interstate commerce above referred to carry the larger part of interstate traffic moving to and from the state, as well as such traffic passing through the state to and from Georgia and Florida and the states to the north, and as these arteries of interstate commerce are constructed almost entirely of standard concrete paving, we think it an unreasonable burden upon the interstate commerce moving over them to enforce the restriction above mentioned, and thereby virtually close

the roads of the state to a large part of such commerce, merely because there are short sections of such highways which have not as yet been constructed of standard paving. As there are a few bridges on these highways which were not built to support the heavy trucks of modern traffic, and a few which are too narrow, we think that the enforcement of the act should not be held unreasonable as to such bridges, provided they are properly marked with warning signs forbidding trucks of excessive weight or size to enter upon them. The facts upon which these conclusions are based are as follows:

[fol. 75] Within the past decade there has been a great development of interstate commerce by truck, and a corresponding change and development of industry in the southeastern part of the United States based upon truck transportation. The market gardening industry, the textile industry, the fertilizer industry and many others have changed in large part their method of doing business as a result of the facilities afforded them by the use of trucks in interstate commerce. This traffic has developed transportation units of great efficiency designed to carry a maximum load with a minimum of burden or strain to the roads over which they pass. Chief among these is the tractor-semi-trailer, in which the power unit is detachable from the load carrying unit, and in connection with the latter imposes no greater strain upon the highway than two trucks of corresponding weight, one following behind the other. Multiplication of axles and wheels distributes the weight of the load, and further protection is obtained from the use of low pressure pneumatic tires, so that with this modern equipment it is possible to move a heavily loaded truck over the highway with no greater injury to the modern standard pavement than would result from the movement over it of an ordinary passenger car. A large part of this interstate traffic, with all that it means to the life of the people of the southeastern part of the United States, will be virtually barred from the highways of South Carolina, and a barrier will be erected not merely against the commerce of the state but also as against the commerce of sister states, if these restrictions are enforced; and the reasonableness of the restrictions must be viewed in the light of such a consequence.

The evidence establishes that South Carolina has the best highway system to be found in the southeastern part

of the United States. There are within the state 60,000 [fol. 76] miles of roads of all kinds, of which 5,948 miles are embraced in the state highway system. Of these, 2,417 miles are of standard pavement; and the arteries of interstate commerce to which we have referred are of this character with the exception of a few short lengths, as for instance 6 or 7 miles in highway No. 1 near Cheraw, out of a total length of the highway of 140 miles or more. This standard paving is not materially different from modern pavement used in most of the other states of the Union, is 18 or 20 feet in width, 7½ or 8 inches thick at the edges and 6 or 6½ inches thick at the center. It is capable of sustaining without injury a wheel load of 8,000 or 9,000 pounds and an axle load of from 16,000 to 18,000 pounds.

Where standard paving is involved, it is the axle or wheel load which is of importance in limitation of weight, and not the gross weight of the truck; for, no matter what the total weight of the vehicle, there is no additional stress on the road if the wheel or axle load is not excessive and there is a space of 40 inches between axles. For this reason, there is no reason for limiting gross load on such roads to 20,000 pounds and likewise no reason for considering the tractor-semi-trailer combination as one vehicle for the purpose of applying the weight limitation. Only five states of the Union limit the gross weight of vehicles to 20,000 pounds, viz., South Carolina, Tennessee, Alabama, Mississippi and Texas.

It is argued that on the roads which are paved with standard pavement there are some bridges which were constructed for a maximum ten ton load; but it appears that these bridges were constructed to bear a series of ten ton trucks going in opposite directions across the bridge (and [fol. 77] the tractor-semi-trailer combination imposes no more stress than one truck following another); that they have been strengthened to bear the increasingly heavy traffic, and that the heavy trucks of interstate commerce have been using them at least since 1930 when the law permitted a gross weight of 40,000 pounds in a truck trailer combination. As a result of the injunction in the Nutt case these bridges, as well as the standard pavement roads, have been used by the traffic which would be excluded by the act of 1933 without substantial injury. It is true, however, that some of these bridges were not constructed to bear the

heavy loads of modern traffic; and as to such bridges the load limitation of the statute cannot be held unreasonable, and our injunctive order will not protect plaintiffs in the use of such bridges where they have been properly marked with notices forbidding their use by trucks not complying with the statutory requirements.

It is likewise argued that even where the roads are of standard construction, this construction has not been used in some of the town and city streets which are a part of the roads; and that the load limitation of the statute is a reasonable one for the protection of these streets. There is no showing, however, that there has been substantial damage to any streets as a result of the heavy traffic which has been passing over them for the past five years, and no reasonable ground to apprehend such damage in the future. And, even if this were not true, a regulation which would in effect drive a vitally important part of interstate commerce from 2,400 miles of road capable of sustaining it, because there are a few weak streets at various places in the system, is a patently unreasonable regulation. A system of highways of 2,400 miles is a substantial system. When it has been designed for the accommodation of traf- [fol. 78] fic of the character carried on by the interstate motor carriers, it is unreasonable to withhold the entire system from the use of such traffic because of a few weak links, which, if injured by the traffic, can be repaired at comparatively slight expense.

So far as the width of the trucks is concerned, it appears that 96 inches is the standard width of the trucks now used in long distance hauling and engaged in interstate commerce, that 85% of the trucks manufactured for long distance hauling are of that width, and that South Carolina is the only state in the Union which limits the width of trucks using its roads to 90 inches. As this limitation would bar from the roads many of the trucks engaged in interstate commerce, and as the standard pavement roads, with the exception of about 100 miles, are 18 to 20 feet in width and furnish ample space for the safe operation of such standard width trucks, the limitation seems clearly an unreasonable one to apply to these roads.

It must be remembered in this connection that this splendid system of highways was constructed to bear the traffic developed by modern conditions; and, because it was

realized that such a system would furnish highways for interstate commerce which would facilitate the growth and development of the nation, the federal government has supplied to the state of South Carolina funds for their construction amounting to $29,000,000, which has been used for that purpose. While the fact that the federal government has aided in the construction of the highways does not, of course, detract from the power of the state to regulate and control them (Morris v. Duby, 274 U. S. 135, 143) it is, we think, a circumstance which should be considered in passing upon the reasonableness of a state statute the effect of which would be to drive an important [fol. 79] part of interstate commerce from the highways and withdraw them to that extent from the use for which they were intended and for which the federal aid was granted. The purpose of this aid in the development of interstate commerce was referred to by the Supreme Court in Nashville etc. R. Co. v. Walters, 294 U. S. 405, 417. In that case the court said of the highways of Tennessee, what is true of these federal aid highways of South Carolina:

"The State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highways legislation. The aim of that legislation is 'a connected system of roads for the whole nation'; 'to provide complete and economical highway transport throughout the Nation'; to furnish 'a new means of transportation, no less important to the country as a whole than that offered by the railroads'; to establish 'lines of motor traffic in interstate commerce.' The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails. The relief of the unemployment incident to the business depression has been the main incentive for highway construction since April 4, 1930—the period in which the highway here in question was undertaken and completed.

"To achieve its purposes, the Federal Government has made large contributions to the cost of the Federal-aid highway system. In each year, it has made to each State grants in money, proportioned according to various factors, to be expended in defraying up to one-half the cost of constructing therein the designated highways. In addition, it has, through the War Department, allotted to the several States their pro rata shares of surplus war equip-

ment and supplies valued at more than $224,000,000. It has at all times given to the several States the benefit of its economic and physical research; and other aid by its experts and administrators. It has, since the depression, given to the several States emergency grants to be expended in highway construction for the relief of unemployment. In the fiscal years ending June 30, 1931, 1932 and 1933, during which this highway was authorized and completed, Tennessee received from the Federal Government, for the highway system, in cash, $11,063,325; and at the close of that period practically the entire expense of building Federal-aid roads in the State was being borne by the Federal Government.

"The Secretary of Agriculture, acting through the Federal Bureau of Public Roads, has determined in large measure, not only the location of the Federal-aid highways in the several States, but also their character and their incidents. Early legislation provided that: 'The Secre- [fol. 80] tary of Agriculture and the State highway department of each State shall agree upon the roads to be constructed therein and the character and method of construction.' The Act of 1921 required each State to select and submit to the Secretary, for approval as the object of future Federal-aid expenditures, 'a system of highways not to exceed 7 per centum of the total mileage of such state'; the system was to 'be divided into two classes, one of which shall be known as primary or interstate highways, and the other which shall connect or correlate therewith and be known as secondary or intercounty highways.' Congress transferred to the Secretary the powers and duties in relation to highways and highway transport originally conferred upon the Council of National Defense. The War Plans Division of the General Staff and Corps of Engineers of the War Department promptly cooperated with the Bureau of Public Roads 'in a study the purpose of which is the selection of those highways which are important from a military standpoint.'

"Upon the secretary devolves the duty of prescribing needful rules and regulations, including such recommendations as he might deem necessary for 'insuring the safety of traffic on the highways.'"

And as bearing upon the reasonableness of regulations which would thus burden and hamper interstate commerce

by truck, and in effect drive much of it from the roads of the state, we must consider the experience of other states and the judgment of those having special knowledge with respect to dealing with size and weight of vehicles using the highways. In this connection we find that the proposed Uniform Act Regulating Traffic on Highways to which we have heretofore referred, published by the Bureau of Roads of the United States Department of Agriculture in 1934, and drafted by the National Conference on Street and Highway Safety in the Department of Commerce, provides a width of 8 feet for motor vehicles, a wheel load of 8,000 and an axle load of 16,000 pounds with high pressure pneumatic tires and a wheel load of 9,000 and an axle load of 18,000 pounds with low pressure tires. The following organizations cooperated in the conference in which this proposed uniform act was drafted, viz.: Bureau of Public Roads, U. S. Department of Agriculture; American Association of Motor Vehicle Administrators; American Automobile Association; American Mutual Al- [fol. 81] liance; American Railway Association; American Transit Association; Chamber of Commerce of the United States; National Automobile Chamber of Commerce; National Bureau of Casualty and Surety Underwriters; and National Safety Council. Practically the same recommendations with respect to size and weight and identically the same as to the matters here under consideration, were made by the American Association of State Highway Officials in convention at Washington Nov. 17, 1932; and these have been approved by the following groups: American Automobile Association; American Farm Bureau Federation; American Motorists Association; American Petroleum Institute; Automobile Manufacturers Association; Detroit Board of Commerce; National Association of Motor Bus Operators; National Grange; National Highway Users Conference; National Industrial Traffic League; National Transportation Committee; and Rubber Manufacturers Association.

The American Association of State Highway Officials in its publication "Who shall use the highways and how", in addition to making the foregoing recommendation as to size and axle weights, says: "Highway stresses are ruled by *wheel loads* and not by *gross loads*", and "so far as road surfaces are concerned, the limitation of axle or

wheel loads gives full protection, let gross loads be what they may". For protection of bridges it recommends that gross weight be fixed by the formula W * C (L plus 40), where W represents total gross weight, L the distance in feet between the first and last axles of a vehicle or combination of vehicles, and C a co-efficient to be determined by the individual states. For this co-efficient a minimum of 700 is recommended. Under this recommendation the minimum gross weight limit could hardly be less than 35,000 pounds.

[fol. 82] The law applicable to the situation, is we think, reasonably clear. There can be no doubt as to the power of the state to prescribe reasonable regulations limiting the size and weight of vehicles upon its highways, both for the sake of preserving the highways themselves and for the protection of the public using them. There is a broad range of legislative discretion with respect to such matters, and legislation is not to be condemned merely because the courts may not agree as to its wisdom. Sproles v. Binford, 286 U. S. 374, 388; Morris v. Duby, 274 U. S. 135. But as indicated by the court in the case last cited (274 U. S. at 145), such regulation must not be so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution toward the building of the highways. In other words, the states in the exercise of their inherent police power may regulate the use of the highways for the protection of the highways themselves and the safety of the public using them, and certainly in the absence of legislation by Congress may make such regulation applicable to interstate as well as intrastate traffic; but they may not adopt arbitrary regulations, not reasonably necessary for the protection of the highways or of the public, which will directly burden interstate commerce, even though such regulations may not discriminate as between commerce which is interstate and that which is not. As was well said by Mr. Justice Strong in Railroad Co. v. Huson, 95 U. S. 465, 473-474: "The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes [fol. 83] comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

Under our dual governmental system the control of the highways is committed to the states, whereas the control of interstate commerce passing over those highways is committed to the federal government; and since the decision in Gibbons v. Ogden, 9 Wheat. 1, it has been settled that the states may not in their control of the highways burden or interfere with the free flow of interstate commerce, the regulation of which has been intrusted to Congress. This would not be doubted if the highway in question were a navigable river, but the principle is the same whatever the character of the highway over which the interstate commerce moves. Thus, the federal power extends over artificial waterways constructed by the states (Ex Parte Boyer, 109 U. S. 629, 632), and over a railroad handling cars moving in interstate commerce, although the railroad has been constructed and is being operated by one of the states (U. S. v. State of California, 297 U. S. 175, 56 S. Ct. 421). And when a state builds a road as a highway of commerce, it cannot burden the flow over it of commerce interstate in character. Buck v. Kuykendall, 267 U. S. 307. As said by Mr. Justice Brewer in In re Dobs, 158 U. S. 564, 590:

"Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fulness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

[fol. 84] "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The consti-

tution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

We have given careful consideration to what was said in Morris v. Duby and Sproles v. Binford, supra, and were at first inclined to think that these decisions were conclusive of the case before us. Upon more mature consideration, we do not think this is correct. It is true that in Morris v. Duby a state statute prescribing a maximum load weight of 16,500 pounds was upheld, and in Sproles v. Binford one prescribing a net load of 7,000 pounds; but in neither of these cases was there any such showing of the unreasonableness of the limitation and of the direct burden upon interstate commerce when applied to a system of standard concrete roads as is contained in the record before us. The same is true of State v. Nutt, supra. In Sproles v. Binford the court commented on the fact (p. 385) that the roads capable of carrying a greater load than the maximum permitted by the statute did not form a regularly connected system and were scattered throughout the state and that the operations of complainant were conducted over all types of highways and bridges. Here we have a connected system of standard highways of the finest character; and there is no reasonable relation between the limitations complained of and the preservation or safety of such highways. In the light of experience and of scientific knowledge, there is no ground for reasonable difference of opinion as to the gross load limitation of 20,000 pounds not being necessary for the [fol. 85] protection of such roads themselves, and there is even less justification for the requirement that the tractor-semi-trailer combination be counted one unit for the purpose of computing gross load. So far as safety is concerned, the evidence shows clearly that there is less danger to traffic from the standard trucks of interstate commerce than from smaller trucks carrying a load for which they are not designed; and certainly there is not enough advantage in a 90 over a 96 inch width to justify the exclusion from an 18 or 20 foot highway of trucks of a width permitted by all other states of the Union. It is true that the enforcement of the provisions of the statute would probably reduce traffic on

the highways to the extent that it would greatly reduce the amount of long distance hauling by truck, but it would do this by placing a direct burden on the interstate commerce now using such highways; and as the highways were constructed to carry such commerce and there is no evidence that the traffic has become so dense as to be a menace to the safety of persons using them, there is no justification for burdening interstate commerce to achieve such a result.

There is another angle from which the reasonableness of police regulations burdening interstate commerce in this way must be judged. Not only has Congress aided in the construction of the roads so that they may become highways of such commerce, but in the enactment of the motor carriers' act, it has recognized truck traffic as a legitimate part of that commerce essential to the welfare of the public and subject to regulation for that reason. As said of Federal aid legislation in Bush Co. v. Maloy, 267 U. S. 317, 324, this legislation regulating motor carriers is of significance be-[fol. 86] cause it makes clear the purpose of Congress that state highways shall be open to commerce of that character. Congress has not attempted to regulate size and weight and there are great practical difficulties in the way of such regulation by Congress. It is of great importance, therefore, that regulation of this matter by the states be held within reasonable bounds, and that they be not permitted, under guise of exercising the police power, to exclude from their highways by unreasonable regulations the interstate commerce which Congress is regulating in the public interest and for the carrying of which it has aided in the construction of roads that form parts of a great national system of highways.

As to highways of the state, other than those which have been paved with standard concrete or standard concrete and asphalt paving, we cannot say that the provisions of the act are unreasonable; and there is no basis upon which an injunction should issue enjoining the enforcement of the act so far as they are concerned. As to them the principles laid down in Morris v. Duby and Sproles v. Binford are applicable. The same is true of bridges which have not been constructed for carrying the heavy trucks of modern traffic, even though they may be located on standard highways. If there were a great many of these, their presence would justify the application of the act to the entire system of highways, but the evidence shows that they are compara-

tively few in number; and interstate commerce, or at least a large part of it, could be so routed as to avoid them entirely. We think, however, that where it is the intention of the defendant to enforce the provisions of the act with respect to any bridge on the roads constituting the arteries of interstate commerce to which we have referred, or on [fol. 87] other roads paved with standard concrete paving, notices to that effect should be posted on both sides of the bridge, of sufficient size and character to give ample warning that the use of the bridge is forbidden to trucks with a gross weight in excess of ten tons or of a width exceeding 90 inches. As the bridges in question are probably capable of carrying the traffic as they have been carrying it for the past five years, we feel justified in enjoining the enforcement of the act as to them unless notice is posted as herein indicated. And in order that the use of bridges may not be unreasonably denied to plaintiffs, and that no hardship may result from the enforcement of our injunctive order with respect to contingencies which may arise and which we are not able now to foresee, we will retain jurisdiction of the cause to the end that the injunctive order may be modified as occasion for such modification may arise.

We are not to be understood as holding that the federal courts possess any regulatory power over the states in the control of the roads. So long as that control is exercised so as not to interfere unreasonably with interstate commerce, the courts have no power to interfere. Any regulation limiting size and weight, having reasonable relation to the preservation of the highways or the safety of persons using them, must be upheld; and we do not doubt the power of the states, in the reasonable exercise of the police power, to bar certain types of vehicles entirely from their roads, or entirely to forbid the use of trucks on certain of the roads provided other roads are available for the use of traffic of this character. But we do not think that the state may erect a Chinese wall around itself by adopting regulations the effect of which would be to bar a large part of interstate [fol. 88] traffic from all of its highways when such regulations have no reasonable relation to their safety or preservation. A gross load limit of 20,000 pounds, as we have seen, has no reasonable relation to either safety or preservation of the standard highway, the provision for counting the tractor-semi-trailer combination as one unit for applying the gross load limitation has even less to commend it, and

the 90 inch width limitation, while doubtless reasonable when viewed in vacuo, cannot be defended in view of the fact that all other states permit the standard width of 96 inches and the only practical effect of the 90 inch limitation is to close the roads to a large part of interstate traffic. It must not be forgotten that the roads, in the final analysis, belong to the people. They are held by the states in trust for the people, who are entitled to make a reasonable use of them. Use for the purposes of interstate transportation is a reasonable use, the control of which the people have vested in the federal government; the states may not unreasonably interfere with such use; and an interference, not necessary to the safety or protection of the roads, which burdens interstate commerce and excludes a large part of it from using the roads, must be condemned as unreasonable. The highways of interstate commerce must not be unreasonably obstructed by the states, whether they be natural highways such as rivers, or whether they be artificial highways which the people themselves have constructed and dedicated to the purposes of commerce.

We have considered the argument that the agricultural interests of the state are served by the trucks which come to the fields for the delivery of fertilizer and the collection of vegetables for market, and we realize that this involves the use of roads other than the standard concrete highways; [fol. 89] but we cannot say that the statute is unreasonable as applied to such roads. The argument that the number of heavy trucks using such roads is few and the damage to them from such occasional use is inconsequential, is a matter for the consideration of the state legislature. Only with respect to the highways specifically mentioned and those federal aid highways of standard concrete or standard concrete and asphalt construction can we pronounce the provisions of the act unreasonable; and only as to them will its enforcement be enjoined as an unreasonable burden on interstate commerce.

Decree Accordingly.

[fol. 90] IN UNITED STATES DISTRICT COURT

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed January 20, 1937

In the above entitled case, the Court finds the facts as follows:

1. That the plaintiffs in this suit are individuals, partnerships, and corporations having their residences in the States of South Carolina, North Carolina and Georgia, and that the defendants are officers either of the State of South Carolina or of a county or municipality thereof and as such are charged with the duty of enforcing the South Carolina law known as Act No. 259 of 1933, Regulating and Limiting the Use of Public Highways in South Carolina by Motor Trucks.

2. That the plaintiffs Barnwell Brothers, Incorporated; Poole Transportation, Incorporated; Horton Motor Lines, Incorporated; National Convoy and Trucking Company; Carolina Transfer and Storage Company; Dewey D. Maner, and Akers and Hudson Motor Lines, Incorporated, are common and contract carriers engaged in the transportation of property in interstate commerce by motor truck throughout the Eastern and Southeastern portion of the United States. That the plaintiffs Merchants Fertilizer Company; Planters Fertilizer and Phosphate Com-
[fol. 91] pany; South Carolina Produce Association; and William C. Geraty Company are engaged in extensive operations requiring the use and employment of motor transportation in interstate commerce.

3. That the amount in controversy in this suit, as to each of the plaintiffs, exclusive of interest and costs, exceeds the sum and value of three thousand dollars.

4. That the intervening railway companies have been allowed to intervene because they are engaged in interstate commerce in the state of South Carolina and are affected by the competition of the truck companies which they contend is based in part upon an unlawful use of the roads.

5. That the Interstate Commerce Commission has been permitted to intervene because of its contention that the regulation of size and width of motor vehicles has been intrusted to it by the Motor Carriers Act of 1935 and that the South Carolina statute regulating size and weight of motor vehicles has been superseded thereby.

6. That the enforcement of the provisions of Act No. 259 of the General Assembly of South Carolina, approved April 28, 1933, 38 Stats. 340, limiting the gross weight of trucks using the highways of that state to 20,000 pounds, pro-

viding that a tractor-semi-trailer combination shall be treated as one vehicle in applying the gross load limitation, and limiting the width of trucks to 90 inches, will greatly burden interstate commerce by trucks using the roads of said state.

7. That the interstate motor transportation industry has grown and developed in the past five years to be an established industry. That standard equipment operated by motor carriers in interstate commerce consists of trucks [fol. 92] and tractor-semi-trailers, and that 85 per cent to 90 per cent of this equipment is 96 inches in width and weighs more than 20,000 pounds gross; that enforcement of the South Carolina law would result in the obstruction of the flow of interstate commerce into, out of, and across the State of South Carolina because it would necessitate the transferring of commodities to and from trucks of the size and weight prescribed by said law, with a consequent increase in the cost of interstate transportation and a discrimination against South Carolina shippers and others shipping into and across South Carolina, and would render it practically impossible for a large part of interstate commerce now conducted by truck to use the roads of that state.

8. That weight and size of motor trucks are important factors in the fixing of interstate rates and that enforcement of the South Carolina law under consideration would necessitate increase of rates for transportation of commodities into, out of, and across South Carolina, would prevent the interchange of motor truck equipment and the establishment of through routes and joint rates on shipments moving into, out of, and across South Carolina.

9. That the development of motor truck transportation has been of great benefit to the textile industry because it has permitted manufacturers to supply customers with commodities in smaller quantities at more frequent intervals, without increased cost, and the customers' demand for this service necessitates the use of motor trucks. That the standard motor truck supplying this service are 96 inches in width and when properly loaded weigh more than 20,000 pounds gross. That enforcement of the South Carolina law would cause delay in transit and increase the cost of interstate transportation of textiles into, out of, and across

the State of South Carolina and would result in discrimina-
[fol. 93] tion against South Carolina textile mills in favor of competitors in other states.

10. That the continued operation and development of large-scale truck farming and the shipping of vegetables out of South Carolina in interstate commerce is dependent upon the peculiar service rendered by motor trucks in the transportation of produce from roadside farms to large and distant markets quickly and economically. That truck farmers and vegetable growers depend, for interstate transportation of their produce, on motor trucks operated not by the farmers themselves but by transportation companies whose trucks move about the country with the seasons. That these trucks, and particularly the refrigerator trucks upon which the farmers depend for shipment of perishables, exceed the size and weight limitations prescribed by the law of South Carolina. That enforcement of the said law would discriminate against South Carolina truck farmers and vegetable growers in favor of their competitors in other states and would injure if not destroy this industry in South Carolina.

11. That a large amount of fertilizer is shipped out of South Carolina in interstate commerce by motor truck and delivered to farmers at the field for immediate use; that this service cannot be rendered by other transportation agencies; that the product has a low value in proportion to weight, and enforcement of the South Carolina law would increase the cost of fertilizer to consumers and jeopardize the fertilizer industry in South Carolina.

12. That interstate movement of household furniture and effects by motor truck has developed with the advent of good roads; that railroads do not offer adequate service and do not compete with trucks in this business; that because of the weight and bulk of furniture it is necessary that loads exceed the size and weight limitations prescribed by the law of South Carolina; that enforcement of the
[fol. 94] South Carolina law would increase the cost and curtail the efficiency of this service to the public.

13. That the business of shipping lumber in interstate commerce from mills in South Carolina has developed with the advent of good roads and motor trucks; that motor transportation enables the mills of South Carolina to meet

the demand of customers for delivery of lumber at the point of use; that if the South Carolina law is enforced the interstate movement of this commodity by truck will practically cease and South Carolina lumber mills will be forced to ship by rail at increased cost of transportation and serious curtailment of service both in time and convenience to the consuming public.

14. That with the advent of good roads and motor truck transportation the furniture manufacturers have changed their method of doing business and have commenced shipping large quantities of furniture in interstate commerce by motor truck; that this method of transportation is now important because customers demand quick shipments in small lots and this service cannot be supplied by railroads; that the transportation of this commodity necessitates the use of trucks 96 inches in width and weighing more than 20,000 pounds gross; that enforcement of the South Carolina law under consideration would interfere with the traffic and would result in discrimination against manufacturers shipping furniture out of and across South Carolina in favor of their competitors.

15. That the port of Charleston, S. C., handles a large volume of inbound and outbound traffic moving in interstate and foreign commerce; that in recent years the percentage of this interstate and foreign traffic moving to and from the port of Charleston in motor trucks has steadily [fol. 95] increased, and at the present time the records of three of the important inter-coastal steamship lines operating in and out of Charleston reflect, respectively, 24 per cent, 58 per cent, and 40 per cent of all tonnage moving by truck; that shippers and consignees rely upon and demand the service now offered by motor trucks because of advantageous rates and because motor trucks offer transportation facilities which cannot be duplicated by other transportation agencies; that motor trucks now operating in and out of Charleston and carrying cargoes in interstate commerce to and from the port are of the standard type, 96 inches in width and weighing more than 20,000 pounds gross; that many of the commodities moving in interstate commerce by motor truck to and from the port of Charleston cannot be profitably transported in trucks within the weight and size limitations prescribed by the law of South Carolina; that enforcement of the South

Carolina law would result in the diversion of large cargoes, normally consigned to the port of Charleston, to other competing ports in other states along the Atlantic seaboard.

16. That flour is one of the major commodities moving into the port of Charleston and that a large part of it is transported in interstate commerce by motor truck; that truck transportation of this commodity is necessary because speed of delivery is essential to prevent deterioration and meet the demand of customers and also because numerous small communities are dependent on shipments in smaller quantities than can be profitably shipped by rail; that the average pay load of a motor vehicle hauling flour is 20,000 pounds, making a gross load of about 30,000 pounds; that enforcement of the law under consideration will increase the cost of transportation.

[fol. 96] 17. That there are approximately 60,000 miles of roads of all kinds in the State of South Carolina; that 5,948 miles of these are embraced in the state highway system; and that 2,417 miles thereof are of standard pavement, not materially different from pavement of which other federal aid highways *is* constructed. All except about 100 miles of the standard pavement highways are 18 or 20 feet in width, 7½ or 8 inches thick at the edges and 6 or 6½ inches thick at the center. All such pavement is capable of sustaining without injury a wheel load of 8,000 to 9,000 pounds or an axle load of 16,000 to 18,000 pounds, depending upon whether the wheels are equipped with high pressure or low pressure pneumatic tires.

18. That the said standard paved roads form a well connected system of highways which have been improved with federal funds as a part of a national system; that they comprise the best system of highways in the southeastern part of the United States, and are capable of carrying the commerce which has been developed by modern truck transportation; that federal highways numbered 1, 15-A, 17, 21, 25, 29 and 52 comprise the great arteries of interstate commerce through the state of South Carolina, are of standard concrete paving as above described, with the exception of a few short stretches, a few miles in length which are not of sufficient importance to justify the denial of the use of these arteries of commerce for the purpose for which they were constructed.

19. That the bridges now being designed and constructed in the state of South Carolina conform to the specifications prescribed by the Bureau of Roads of the Department of Agriculture and are capable of carrying loads of 16,000 pounds per axle, and that those that were not so designed [fol. 97] in the past and are now considered weak have been strengthened to meet the demands of present day traffic; that there are a few old bridges on the main arterial highways above mentioned and also on the other roads paved with standard concrete paving which were not designed for carrying trucks of greater weight than 20,000 pounds and a few which are too narrow to permit the use of trucks 96 inches in width, and as to these the provisions of the law cannot be deemed unreasonable; but that, as these bridges are few in number and it would be unreasonable to exclude interstate commerce from the entire highway system on their account, such of them as are considered by the State Highway Department to be unsafe for use by trucks of greater width than 90 inches or greater weight than 20,000 pounds should be so marked so as to afford ample warning that the use of the bridge is forbidden to trucks of that size and weight.

20. That the usual vehicle used by motor transportation companies in interstate commerce is a tractor-semi-trailer combination, 96 inches wide and carrying a pay load of 10 tons or 20,000 pounds and the size and weight of such vehicles are determining factors in the fixing of rates for interstate transportation by motor truck. That the effect on the highways and bridges of the state of South Carolina of a tractor-semi-trailer combination is not different from the effect produced by two vehicles of equal weight, one following the other; and that the provision requiring that the tractor-semi-trailer combination be considered as one unit for the application of the weight limitation is unreasonable.

21. That the rigid type highways of the state of South Carolina are typical of the design of the highways of that type in a great majority of the states in the United States today, and that they will permit axle loads of 16,000 to [fol. 98] 18,000 pounds to be hauled thereon without damage to said highways. That they have been subjected to the traffic of heavy trucks with gross weights in excess of 20,000 pounds and other vehicles since 1930 and are now being subjected to such traffic and there is no evidence of

deterioration thereof as result of such traffic except in isolated instances due to unusual conditions.

22. That gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but wheel or axle weight; that vehicles engaged in interstate commerce are so designed and the pressure of their weight is so distributed by their wheels and axles that heavy gross loads can be carried over concrete roads without damage to the concrete surface; and that a gross weight limitation of 20,000 pounds is unreasonable as a means of preserving the highway.

23. That the gross load limitation has no reasonable relationship to the safety of the public using the highways; that the modern type vehicles engaged in interstate commerce are safer on the highways than the overloaded light trucks which would result from enforcement of the gross load limitations, because they make possible a better distribution of weight and have better braking equipment.

24. That the width limitation of 90 inches is unreasonable when applied to the standard concrete highways of the state and the arteries of interstate commerce heretofore mentioned, in view of the fact that all other states in the Union permit a width of 96 inches, this is the standard width of trucks engaged in interstate commerce, and the enforcement of the 90 inch limitation would exclude from the highways a large portion of the equipment now used in [fol. 99] interstate commerce without material advantage to the safety or preservation of the highways.

25. That only four other states in the entire Union prescribe a gross weight limit as low as 20,000 pounds; and such a limit is contrary to the recommendation of the American Association of State Highway Officials; that the National Conference on Street and Highway Safety in the U. S. Department of Commerce has recommended for adoption a uniform act limiting size and weight, in which weight is limited with respect to wheel and axle loads and width is limited to 96 inches; that gross weight is of importance in a modern highway system only in connection with the use of bridges, and modern bridges are so constructed that a gross weight limitation of 20,000 pounds is unreasonable with respect to them.

26. That the provisions of the statute limiting gross weight of vehicles to 20,000 pounds, providing that the tractor-semi-trailer combination shall be considered as one unit for applying this limitation, and limiting the width of vehicles to 90 inches, are unreasonable restrictions when applied to the highways heretofore mentioned which constitute the great arteries of interstate commerce of the state and the other standard concrete highways constituting a part of the state highway system; and that as applied to said highways they constitute an unreasonable restriction and burden on interstate commerce; but that they are not unreasonable as applied to other roads of the state.

27. That the enforcement of the said provisions of the act against the plaintiffs while they are engaged in interstate commerce would in large measure destroy their interstate business, would subject them to ruinous penalties if they [fol. 100] should attempt to carry on said business, and would otherwise inflict upon them great and irreparable injury.

Conclusions of Law

The Court reaches the following conclusions of law:

1. That the said provisions of Act No. 259 of 1933 of the General Assembly of South Carolina are an unreasonable burden upon interstate commerce when applied to trucks operating upon highways 1, 15-A, 17, 21, 25, 29 and 52 and the other standard concrete highways which form a part of the state highway system, except as to bridges not designed for supporting heavy traffic as set forth in the foregoing findings of fact.

2. That the said provisions of the act cannot be condemned as an unreasonable burden upon interstate commerce when applied to the other roads and highways of the state.

3. That Congress has not assumed to control size and weight of vehicles by the Motor Carriers Act of 1935.

4. That the provisions of the Act 259 of South Carolina of 1933 are not violative of the due process or equal protection clauses of the 14th Amendment.

5. That plaintiffs are entitled to injunctive relief restraining defendants from enforcing against plaintiffs, while plaintiffs are engaged in interstate commerce on the arteries

of interstate commerce heretofore described and the other standard concrete highways of the state of South Carolina, the provisions aforesaid of Act 259 of South Carolina of 1933 limiting gross weight of vehicles to 20,000 pounds, providing that tractor-semi-trailer combinations shall be counted as one unit in applying gross weight limitations, and limiting width to 90 inches.

[fol. 101] John J. Parker, U. S. Circuit Judge, Fourth Circuit. Elliott Northcott, U. S. Circuit Judge, Fourth Circuit. J. Lyles Glenn, U. S. District Judge, Eastern and Western Districts of South Carolina.

[fol. 102] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

BARNWELL BROS., INC., a North Carolina Corporation, et al., Plaintiffs,

vs.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, et al., Defendants

DECREE—Filed January 20, 1937

This cause coming on for final hearing and being heard by the undersigned special court of three judges constituted pursuant to section 266 of the Judicial Code, and the Court having made findings of fact and announced its conclusions of law as appears in the written Findings of Fact and Conclusions of Law filed herewith; now, therefore, for the reasons set forth in the written opinion herewith filed, it is ordered, adjudged and decreed as follows:

(1) That the defendants, their agents and servants, be and they hereby are, restrained and enjoined from enforcing against the plaintiffs while they are engaged in interstate commerce on the highways of the State of South Carolina numbered 1, 15-A, 17, 21, 25, 29, and 52, or on such portions of other federal aid highways as may be of standard concrete or concrete and asphalt construction, any provision of Act No. 259 of the General Assembly of South Carolina limiting the gross weight of trucks on highways to 20,000

pounds, or providing that a tractor-semi-trailer combination shall be considered a single unit for the purpose of determining weight and thereby limiting the gross weight of such combination to 20,000 pounds, or limiting the width of [fol. 103] vehicles to 90 inches, if the vehicle does not exceed 96 inches in width.

(2) That the provisions of this injunctive order shall not extend to bridges on the highways mentioned in the preceding paragraph where such bridges have not been constructed with sufficient strength to support the heavy trucks of modern traffic or are too narrow to accommodate such traffic safely, provided that the State Highway Department shall erect at each end of any such bridge a proper notice of sufficient size and character to give ample warning that the use of the bridge is forbidden by trucks exceeding the weight or width limit, and further provided that the proper authorities shall take the necessary steps to enforce the law against the use of such bridges by such trucks.

(3) That the application to enjoin the enforcement of the act with respect to the other roads and bridges of the state be and same is hereby denied.

(4) That plaintiffs recover of defendants their costs in this suit to be taxed by the Clerk.

(5) That jurisdiction of this cause be retained for the purpose of making any such change or modification with respect to paragraphs one or two hereof as may hereafter appear to be proper in the premises.

Done at Charlotte, North Carolina, this the 20th day of January, 1937.

John J. Parker, U. S. Circuit Judge, Fourth Circuit. Elliott Northcott, U. S. Circuit Judge, Fourth Circuit. J. Lyles Glenn, U. S. District Judge, Eastern and Western Districts of South Carolina.

[fol. 104] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TERM—Filed January 20, 1937

The Court having this day delivered its opinion in the cause and submitted to counsel for the respective parties

its findings of fact and conclusions of law, together with the decree, all of which it proposes to file; and

It appearing that counsel have not had sufficient time to consider the same and file any objections or exceptions thereto, as they may be advised, before the Court recesses;

It is Ordered That this term of this Court be extended for sixty days, so as to continue the jurisdiction of this Court over the cause and all matters relating thereto, including any reconsideration or modification of said findings of fact, conclusions of law, and decree to be entered thereon, and that the time within which counsel for any party may file any objections or exceptions to the same, or take any other steps properly incident to any appeal to the Supreme Court of the United States, is hereby likewise extended for sixty [fol. 105] days, except as otherwise provided by the applicable statute.

John J. Parker, United States Circuit Judge. Elliott Northcott, United States Circuit Judge. J. Lyles Glenn, United States District Judge.

January 20, 1937.

[fol. 106] In United States District Court

[Title omitted]

Order Extending Term—Filed February 13, 1937

Upon consideration of the attached petition and upon motion of Steve C. Griffith, Esq., and J. B. S. Lyles, Esq., Solicitors for all the defendants, and it appearing to the Court that good cause for this extension has been shown,

It is Ordered That defendants in the above entitled suit, petitioners herein, be and they are hereby granted an extension of thirty days—that is, to and including March 16, 1937, within which to file their præcipe and statement of evidence, as required by Rule 88 of this Court.

J. Lyles Glenn, United States District Judge for the Eastern District of South Carolina.

February 9th, 1937.

[fol. 107] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed February 25, 1937

Come now all of the defendants (including intervenors) above named, and, with their petition for appeal contemporaneously filed herewith submit the following assignment [fol. 108] of errors, on which they will rely on their appeal to the Supreme Court of the United States from the final decree entered on the 20th day of January, 1937, by said District Court in the above entitled cause.

(With Respect to the Motion to Dismiss)

1. The District Court erred in denying defendants' motion to dismiss the bill.

2. The District Court should have held, on defendants' motion to dismiss the bill, that the facts alleged in the bill, taken in connection with facts judicially known to the Court, failed to establish that the contested weight and width limitations of the South Carolina statute were unreasonable and did not bear a direct and substantial relation to the preservation of the highways and to the safety of other travelers making a normal use thereof, and should have held that they affected interstate commerce only incidentally, and should have dismissed the bill.

(With Respect to Findings of Fact)

3. The District Court erred in its finding of fact numbered 17, wherein it found, with reference to the 2417 miles of standard pavement roads in South Carolina, that "All such pavement is capable of sustaining without injury a wheel load of 8,000 to 9,000 pounds or an axle load of 16,000 to 18,000 pounds, depending upon whether the wheels are equipped with high pressure or low pressure pneumatic tires.", in that such finding is not justified by the evidence.

4. The District Court erred in its finding of fact numbered 18, wherein it found, with reference to the standard paved roads of South Carolina, that they "are capable of carrying the commerce which has been developed by modern truck transportation; that federal highways numbered

1, 15-A, 17, 21, 25, 29 and 52 comprise the great arteries of interstate commerce through the state of South Carolina, are of standard concrete paving as above described, with [fol. 109] the exception of a few short stretches, a few miles in length which are not of sufficient importance to justify the denial of the use of these arteries of commerce for the purpose for which they were constructed.", in that (1) such finding is not justified by the evidence, and (2) there is no substantial or specific evidence to show that the weak sections of roads excepted in this finding are either few in number or only a few miles each in length.

5. The District Court erred in its finding of fact numbered 19, wherein it found, with reference to bridges on the highway system of South Carolina, "that there are a few old bridges on the main arterial highways above mentioned and also on the other roads paved with standard concrete paving which were not designed for carrying trucks of greater weight than 20,000 pounds and a few which are too narrow to permit the use of trucks 96 inches in width, and as to these the provisions of the law cannot be deemed unreasonable; but that, as these bridges are few in number and it would be unreasonable to exclude interstate commerce from the entire highway system on their account, such of them as are considered by the State Highway Department to be unsafe for use by trucks of greater width than 90 inches or greater weight than 20,000 pounds should be so marked so as to afford ample warning that the use of the bridge is forbidden to trucks of that size and weight.", in that (1) the evidence fails to establish that the old bridges, not designed for carrying trucks of greater weight than 20,000 pounds and too narrow to permit the use of trucks 96 inches in width, were few in number; and (2) the evidence does not justify the Court in assuming the prerogative of imposing conditions upon which the sovereign State may enforce an admittedly valid statute.

6. The District Court erred in its finding of fact numbered 20 wherein it found "That the effect on the highways and bridges of the state of South Carolina of a tractor- [fol. 110] semi-trailer combination is not different from the effect produced by two vehicles of equal weight, one following the other; and that the provision requiring that the tractor-semi-trailer combination be considered as one unit

for the application of the weight limitation is unreasonable.", in that such finding is not justified by the evidence.

7. The District Court erred in its finding of fact numbered 21, wherein it found "That the rigid type highways of the state of South Carolina are typical of the design of the highways of that type in a great majority of the states in the United States today, and that they will permit axle loads of 16,000 to 18,000 pounds to be hauled thereon without damage to said highways. That they have been subjected to the traffic of heavy trucks with gross weights in excess of 20,000 pounds and other vehicles since 1930 and are now being subjected to such traffic and there is no evidence of deterioration thereof as a result of such traffic except in isolated instances due to unusual conditions.", in that (1) such finding is not justified by the evidence, and (2) there is no material or definite evidence in the record that such highways have been subjected to the traffic of heavy trucks with gross weights in excess of 20,000 pounds and other vehicles since 1930; and (3) there is a failure of evidence to prove that there was no substantial deterioration of such highways as the result of such excessively heavy traffic.

8. The District Court erred in its finding of fact numbered 22, wherein it found "That gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but wheel or axle weight; that vehicles engaged in interstate commerce are so designed and the pressure of their weight is so distributed by their wheels and axles that heavy gross loads can be carried over concrete roads without damage to the concrete surface; and that a gross weight limitation of 20,000 pounds is unreasonable as a means of preserving the highways.", in that [fol. 111] (1) such finding is not justified by the evidence, and (2) a gross weight limit is reasonable and easy of enforcement.

9. The District Court erred in its finding of fact numbered 23, wherein it found "That the gross load limitation has no reasonable relationship to the safety of the public using the highways; that the modern type vehicles engaged in interstate commerce are safer on the highways than the overloaded light trucks which would result from enforcement of the gross load limitations, because they make

possible a better distribution of weight and have better braking equipment.", in that (1) such finding is not justified by the evidence, and (2) the Court wrongfully assumes, as a premise of its finding, that light trucks will be overloaded in violation of the law.

10. The District Court erred in its finding of fact numbered 24, wherein it found "That the width limitation of 90 inches is unreasonable when applied to the standard concrete highways of the state and the arteries of interstate commerce heretofore mentioned, in view of the fact that all other states in the Union permit a width of 96 inches, this is the standard width of trucks engaged in interstate commerce, and the enforcement of the 90 inch limitation would exclude from the highways a large portion of the equipment now used in interstate commerce without material advantage to the safety or preservation of the highways.", in that the finding is not justified by the evidence.

11. The District Court erred in its finding of fact numbered 26, wherein it found that the weight and width limits imposed by the statute " * * * are unreasonable restrictions when applied to the highways heretofore mentioned which constitute the great arteries of interstate commerce of the state and the other standard concrete highways constituting a part of the state highway system; and that as applied to said highways they constitute an unreasonable restriction and burden on interstate commerce; * * *", in that such finding is not justified by the evidence.

[fol. 112] 12. The District Court erred in its finding of fact numbered 27, wherein it found "That the enforcement of the said provisions of the act against the plaintiffs while they are engaged in interstate commerce would in large measure destroy their interstate business, would subject them to ruinous penalties if they should attempt to carry on said business, and would otherwise inflict upon them great and irreparable injury", in that such finding is not justified by the evidence.

(With Respect to Findings of Fact in Opinion)

13. The District Court erred in finding as a fact in its Opinion (typed page 13), with reference to the effect of heavy traffic on the streets of towns and cities of the State,

that "There is no showing, however, that there has been substantial damage to any streets as a result of the heavy traffic which has been passing over them for the past five years, and no reasonable ground to apprehend such damage in the future", in that (1) such finding is not justified by the evidence, (2) there is no substantial or definite evidence negativing substantial damage to such streets, and (3) the Court shifts the burden of proof from plaintiffs to defendants.

14. The District Court erred in finding as a fact in its Opinion (typed page 21) "Here we have a connected system of standard highways of the finest character; and there is no reasonable relation between the limitations complained of and the preservation or safety of such highways. In the light of experience and of scientific knowledge, there is no ground for reasonable difference of opinion as to the gross load limitation of 20,000 pounds not being necessary for the protection of such roads themselves, and there is even less justification for the requirement that the tractor-semi-trailer combination be counted one unit for the purpose of computing gross load. So far as safety is concerned, the evidence shows clearly that there is less danger to traffic from the standard trucks of interstate com- [fol. 113] merce than from smaller trucks carrying a load for which they are not designed; and certainly there is not enough advantage in a 90 over a 96 inch width to justify the exclusion from an 18 or 20 foot highway of trucks of a width permitted by all other states of the Union", in that (1) such finding is not justified by the evidence, and (2) is contrary to the light of experience and scientific knowledge in such respect; and (3) the Court assumes that smaller trucks will be overloaded in violation of law.

(With Respect to Facts That Should Have Been Found)

15. The District Court should have found as a fact that the contested weight and width limitations of the South Carolina statute were reasonable and bore a direct and substantial relation to the preservation of the highways and to the safety of other travelers making a normal use thereof, and that they affected interstate commerce only incidentally.

16. The District Court should have found as a fact that there was a substantial and material difference of opinion

and judgment on the factual question whether the contested weight and width limitations of the South Carolina statute were reasonable and bore a direct and substantial relation to the preservation of the highways and the safety of other travelers making a normal use thereof, and affected interstate commerce only incidentally.

17. The District Court should have found as a fact that the contested weight and width limitations of the South Carolina statute were not an unreasonable burden on interstate commerce, and affected it only incidentally.

18. The District Court should have found as a fact that the highway system of South Carolina was constructed by the State, as its own property, with its own funds, excepting only those obtained from federal aid, and was intended, designed and constructed only for passenger automobiles and light traffic in trucks, and that the enormous increase in heavy truck traffic, which has since developed, and the use of the highways for substantial and heavy traffic in [fol. 114] heavy trucks, has and will materially damage them.

(With Respect to Conclusions of Law)

19. The District Court erred in its conclusion of law numbered 1, that the weight and width limitations of the South Carolina statute are an unreasonable burden on interstate commerce when applied to trucks operating on the designated and standard concrete highways of South Carolina, in that the evidence and facts judicially known show such limitations to be a valid exercise of the police power of the State as to such designated and standard concrete highways, and that they affect interstate commerce only incidentally.

20. The District Court erred in its conclusion of law numbered 5, to the effect that plaintiffs are entitled to injunctive relief restraining defendants from enforcing the weight and width limitations of the statute while plaintiffs are engaged in interstate commerce upon the designated highways and standard concrete highways of South Carolina, in that (1) the evidence and facts judicially known show such limitations to be a valid exercise of the police power of the State as to such designated and standard concrete highways, affecting interstate commerce only inci-

dentally, and (2) the Court should have limited the injunctive relief to trucks not exceeding the weight limits which the Court itself found to be reasonable and proper maximum weight limits.

21. The District Court should have concluded that the contested weight and width limitations of the South Carolina statute were a valid exercise of the police power of South Carolina and not an unreasonable burden on interstate commerce as to plaintiffs.

22. The District Court having concluded (conclusion of law numbered 4) that the weight and width limitations of the South Carolina statute are not violative of the due [fol. 115] process and equal protection clauses of the Fourteenth Amendment, erred in concluding (conclusion of law numbered 1) that the same limitations, in the same circumstances, are violative of the commerce clause of the Federal Constitution, in that the latter conclusion is repugnant to and inconsistent with the former.

23. In its consideration of the evidence and facts within judicial knowledge, the District Court throughout the case misapplied the rule that plaintiffs bore the burden of proving that the contested weight and width limitations of the South Carolina statute were unreasonable and arbitrary and had no direct or substantial relation to the preservation of the highways or the safety of others making a normal use thereof, and cast upon the defendants the burden of proving the negative of such propositions.

(With Respect to Decree)

24. The District Court erred in enjoining defendants (Decree, section 1) from enforcing against plaintiffs while engaged in interstate commerce on the highways of the State of South Carolina numbered 1, 15-A, 17, 21, 25, 29 and 52, or on such portions of other federal aid highways as may be of standard concrete or concrete and asphalt construction, the contested weight and width limitations of the South Carolina statute, in that they are a valid exercise of the police power of South Carolina, affecting interstate commerce only incidentally, and are not an unreasonable burden on such commerce.

25. The District Court erred in enjoining defendants (Decree, section 1) from enforcing against plaintiffs while

engaged in interstate commerce on the highways of the State of South Carolina numbered 1, 15-A, 17, 21, 25, 29 and 52, or on such portions of other federal aid highways as may be of standard concrete or concrete and asphalt construction, the contested weight and width limitations of the South Carolina statute, without limiting the protection of the injunction to trucks with a wheel load not exceeding [fol. 116] 8,000 to 9,000 pounds, or an axle load not exceeding 16,000 to 18,000 pounds, depending upon whether the wheels are equipped with high pressure or low pressure pneumatic tires, in accordance with its finding of fact numbered 17.

26. The District Court, having found as a fact in its Opinion (typed page 12), with reference to the development of modern transportation units, that "* * * with this modern equipment it is possible to move a heavily loaded truck over the highway with no greater injury to the modern standard pavement than would result from the movement over it of an ordinary passenger car.", erred in not limiting the protection of its injunction to modern equipment of such a character and having such non-injurious effect on the standard pavement.

27. The District Court erred in substituting its judgment as to the weight and width limits of trucks necessary to preserve and promote safety on highways numbered 1, 15-A, 17, 21, 25, 29 and 52, and on such portions of other federal aid highways as may be of standard concrete or concrete and asphalt construction, for the judgment of the Legislature of South Carolina in this respect, when the evidence showed a dispute among fairminded men as to necessary and proper weight and width limits, thereby usurping the prerogative of the State of South Carolina.

28. The District Court erred (Decree, section 2) in conditioning the right of the State of South Carolina to enforce its statute (admittedly valid) as to bridges too weak and too narrow, upon the erection of signs at such bridges, and the enforcement of the valid law with reference thereto, thereby usurping the prerogative of the sovereign State of South Carolina.

29. The District Court erred in its Decree (section 1) in that the effect of the injunction granted is that the sovereign State of South Carolina must classify the highways of the

State Highway System for the purpose of enforcing its valid police regulations, first, as between federal aid high- [fols. 117-127] ways and non-federal aid highways; second, as between specified highways extending as units across the State and other highways of the State Highway System; and, third, as between sections of highways paved with standard pavement and other sections of the same highways of different construction.

30. The District Court erred in not holding that the State of South Carolina built its highways with its own money, except for some funds received from federal aid, that it owns them and has the right to use them, and has the absolute right to fix the limits on weight and width of vehicles which may be operated thereon; and that the District Court was without authority to supplant the judgment of the General Assembly of South Carolina as to the proper weight and width limits of vehicles using such highways.

Prayer for Reversal

For which errors the defendants pray that the said decree of the District Court of the United States for the Eastern District of South Carolina, dated and filed January 20, 1937, be reversed, that the injunction granted against defendants be vacated, that the bill of complaint be dismissed, and for costs.

John M. Daniel, Attorney General; J. Ivey Humphrey, Assistant Attorney General; M. J. Hough, Assistant Attorney General; Eugene S. Blease and Steve C. Griffith, Solicitors for Original Defendants. Thomas W. Davis, Douglas McKay, M. G. McDonald and J. B. S. Lyles, Solicitors for Intervening Defendants.

February 4, 1937.

[fol. 128] In United States District Court

[Title omitted]

Statement of the Evidence and Proceedings Before the Court—Filed February 25, 1937

The specially constituted District Court, composed of Hon. John J. Parker, United States Circuit Judge, Hon. Elliott Northcott, United States Circuit Judge, and Hon.

J. Lyles Glenn, United States District Judge, convened at Columbia, S. C., on November 30, 1936, and the following proceedings, not otherwise appearing of record, were held.

Motions were submitted for intervention on behalf of the Interstate Commerce Commission and Marlboro Oil Company, as parties plaintiff, and on behalf of the National Association of Public Service Commissioners, Atlantic Coast Line Railway Company, Receivers of Seaboard Air Line Railway, and Charleston & Western Carolina Railway Company, as parties defendant, based on petitions, all of which have been duly filed. The Court took these under consideration, but announced that in the meantime it would allow each of the solicitors presenting the motions to appear amicus curiae. Since all of these motions and petitions were in proper form and no question concerning them is raised on the appeal, it is stipulated that they are not to be printed.

[fol. 129] Motion to Dismiss

Oral argument was then held at length on the defendants' Motion to Dismiss. At the conclusion thereof the Court made the following ruling:

Judge Parker: We indicated we would be giving consideration to all the questions that have arisen so far, and I will announce our conclusions. In the first place, we think that the petitioners who have asked to intervene should be allowed to intervene, except the Boards represented by Mr. Benton. As to them, we will allow Mr. Benton to appear amicus curiæ to present his contentions. Shippers and railroad companies who have asked to intervene will be allowed to intervene.

As to the scope of the hearing, we are of the opinion that in order that the case may be presented in its entirety on an appeal to the Supreme Court, that this Court of three judges should reconsider all the questions heretofore determined by the District Judge and give our decision on the bill as filed, so that when appeal is taken by either side to the Supreme Court of the United States, the Supreme Court may have the entire case before them and not have the case in piece-meal. We will reconsider all the questions arising on the bill.

As to the question of the effect of the Motor Carrier Act, we are of the opinion that the effect of that Act is not that

Congress has occupied the field with respect to size and weight. We don't think that that Act effects the question before the Court at all. We interpret the Act that Congress has expressly refused to enter the field in size and weight, as a matter of regulation for the time being. As to the power of Congress to enter that field, we express no opinion.

Now, with respect to the question of taking testimony, we are of the opinion that testimony should be taken bear- [fol. 130] ing upon the reasonableness of the Act as it affects interstate commerce. We are indicating no opinion as to whether the Act is reasonable or unreasonable. We think that this Court should have the benefit of testimony as to the allegations of the bill that the Act is an unreasonable burden upon interstate commerce, particularly in view of what the Supreme Court said in the Morris versus Duby case: "Regulation as to the method of use, therefore, necessarily remains with the State and cannot be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them."

In other words, we will pass upon the question as to whether the Act constitutes an unreasonable burden upon interstate commerce, and we are of the opinion that testimony should be addressed to that question and that question alone, and we see no reason why any great volume of testimony need be taken, or we see no reason why the taking of testimony should consume very much time.

One other question remains, and that is whether we are to hear the case on the application for interlocutory injunction or hear it finally now, and we see no reason for hearing the application for interlocutory injunction and then having another hearing on whether we are going to grant final injunction of it. The Supreme Court has said time and time again that the discretion of the Court in granting or refusing an interlocutory injunction in cases of this character will not be reviewed in the absence of abuse by the Court. Manifestly, it is of importance to everybody concerned in this case that the question be finally decided by the Supreme Court. The only way to get a final decision by the Supreme Court is by final judgment by this Court [fol. 131] and the findings and appeal to the Supreme Court, and then the Supreme Court can pass on all the questions

involved and finally settle the matter. This has been in litigation now for about three years. It is time it was brought to an end, and we see no reason why you shouldn't put your testimony in and let us finally determine the case.

It was then stipulated and agreed in open court by all counsel that the hearing should be both interlocutory and final, and that the Court should render a final decree in the case.

Mr. Ross: If Your Honor please, may I ask a question for the purpose of clearing up our own status in the proceeding? The Commission intervened when it seemed to them the proceedings were limited to the question of supersession, and the possible question of the constitutionality of the Federal Act. Of course, I understand under the Courts' ruling the whole matter was opened up. The Commission has not felt that it was interested to the point of participating in the hearing that was confined entirely to the question of burden on interstate commerce or unreasonableness of this Act.

Now, I think I should say to the Court we brought certain witnesses and testimony here, thinking that their testimony would be proper in connection with a consideration of those matters; more or less a joint proposition on the question of construction of the Act to some extent, on the question of constitutionality to some extent, but as I understand the Courts' decision now, the complaint has in effect been dismissed as to the allegation of supersession.

Judge Parker: No, I don't think I meant to convey that impression. What I meant to convey was this, I am telling you what the Court thinks about that question of law. When we write the opinion, unless we change our mind, we are going to interpret the Act and say the Act does not apply to size and weight. The Interstate Commerce Commission [fol. 132] is a party to the suit, and the Interstate Commerce Commission might desire to contest that holding in the Supreme Court.

Mr. Ross: And it would still be open to us to present testimony that might be competent, that might still go to the Act. We would be free to present that?

Judge Parker: I suggest you do this. We don't see now how that testimony could have any bearing on the case, but suppose when you think proper you present it and we will pass on it at that time.

Mr. Ross: That is satisfactory, Your Honor.

Mr. Lyles: I think it is understood that so far as the intervention of the railroads is concerned, that we are permitted to adopt the answer which has been filed by the State and go ahead on that issue.

Judge Parker: I don't know whether that is understood, but I think that should be understood now. We will make an order to that effect.

Mr. Ross: No objection.

Judge Parker: The intervening railroads are allowed to adopt the answer of the defendants, and the intervening shippers are allowed to adopt the allegations of the bill.

Mr. Funkhouser: That is satisfactory to us. It is the answer filed by the State, and they are adopting that answer as their answer.

Judge Parker: Yes.

Mr. Funkhouser: That is perfectly satisfactory.

Judge Parker: And the intervening shippers are adopting your bill.

Mr. Funkhouser: That is right.

[fol. 133] Statement of Evidence

THOMAS J. BURKE, a witness for the plaintiffs, having been first duly sworn, testified.

Direct examination.

By Mr. Funkhouser:

My name is Thomas J. Burke. I live at Charleston, S. C. I am Commissioner of the Charleston County Traffic Bureau and look after the shippers and receivers of freight in the City of Charleston, and also the Port of Charleston, in all transportation matters, particularly as to how rates affect the Port of Charleston as compared with other ports—competitive points.

Q. Are you familiar with the law of South Carolina limiting the gross weight of trucks to 20,000 pounds, and the width of trucks to 90 inches?

A. Yes.

Q. If that law is enforced, what effect would this have on the shipping industry in connection with Charleston?

Mr. Griffith: If Your Honor please, we object to that.

Judge Parker: On what grounds?

—— ——: ——.

Judge Parker: Overruled.

Mr. Griffith: Exception.

Judge Parker: I think we will save time if we remember the Federal rule that the Court is passing on testimony. On irrelevant testimony we are assumed to disregard and all relevant we are assumed to consider.

Mr. Griffith: I was doubtful whether that rule applied. Do I understand it is not necessary to object to any testimony that is incompetent or irrelevant?

[fol. 134] Judge Parker: It is not necessary.

The Witness: At the Port of Charleston we have shipments arriving from various ports throughout the country. We have coastwise — between New York, Philadelphia, and Baltimore to Charleston. We also have coastwise shipping from the Gulf ports of Houston, Galveston, New Orleans, Lake Charles, Louisiana; then we have intercoastal service from the Pacific Coast ports of the United States arriving in Charleston, and then foreign commerce coming into the Port and going through the Port to foreign ports of a large part of it, and the Port of Charleston would be seriously affected by this weight law. I can call one particular instance on an inbound shipment. This is a shipment of cotton tire, cotton fabric moving from Gastonia, N. C. This movement has been going to Charleston for a number of years, consigned to the Pacific coast. The shippers state if they cannot make the shipments through Charleston——

Judge Parker: I don't think you ought to go into hearsay.

A. This shipment would be discontinued if the weight law went into effect, and the shipment would move to the port of Wilmington, N. C. on the inbound products from the Pacific Coast moving out by it to points in North Carolina, there is a large movement, but the shipments would be discontinued and the movement would be made to the North Carolina points through the port of Wilmington. This is because the steamship companies operate not only to Charleston, but to Savannah, Wilmington and Norfolk, Virginia.

The inbound freight comes into Charleston on the A. & P. trucks, larger trucks than are permitted under this gross weight law. The outbound traffic is moving by the A. & P. [fol. 135] trucks down from Gastonia to Charleston. I have

seen those trucks at the dock and looked at them. They are larger than a truck that would carry a gross weight of 20,000 pounds.

Enforcement of the weight law would cause discrimination against the Port of Charleston, because it would tend to divert that traffic that moves by truck from Charleston to the ports of Savannah and Wilmington. The main commodities that move through the Port of Charleston are those moving from the Pacific coast; canned goods of all kinds, dried fruits, dried beans and peas. All commodities moving from the eastern ports of the United States, we have practically everything that moves into the interior of South Carolina and North Carolina; these goods that are used in the wholesale grocery trade, hardware lines and the manufacturers. For instance, to the cotton piece-goods manufacturers we have chemicals, acids and dyestuffs that move out of Eastern cities by boat line to Charleston and then by truck from Charleston to the Carolina mill points.

Q. What percentage of these commodities move to and from the Port of Charleston by trucks?

A. Taking the Pacific Coast movement on inbound movement, these movements coming into the Port of Charleston and moving from Charleston to the interior, during the ten months of 1935, 14% of that tonnage moved by truck. Comparing the first ten months of 1936, 24% of that commerce moved by truck. On the outbound shipments from the interior points in North Carolina or in South Carolina moving to the Pacific Coast, the outbound shipments for the ten months of 1935, 54% moved by trucks; for the ten months of 1936, 58% moved by trucks. Taking the coastwise steamship lines, the Clyde-Mallory, comparing the tonnage with the railroad tonnage, 30% of their tonnage moved by truck. We come to the Bull Steamship Company, [fol. 136] operating from Baltimore, Philadelphia, and also from the Gulf ports, their approximate tonnage moving by truck was about 40%.

Q. How many steamship lines come into Charleston?

A. On the intercoastal trade we have inbound the American-Hawaiian Steamship —; on the outbound, the Williams Steamship Corporation; on the coastwise trade, we have the Clyde-Mallory lines and Bull Steamship Company. Then the Bull Steamship Company operate a service between Porto Rico and Charleston. Then we have the for-

eign steamer lines of monthly sailings to all United Kingdom and Continental ports.

The Witness: All those steamship lines haul freight into Charleston for distribution through Charleston to the interior part of the country; and all of them carry cargo out of Charleston. A certain percentage of the cargo for and from all those steamship lines goes by truck into and out of Charleston; some moves by the railroads. The percentage I named at first was the intercoastal traffic; it applied to the Williams Steamship Corporation and the American-Hawaiian Steamship Company, the coastwise traffic applying to the Clyde-Mallory and the Bull Steamship Company. As to the foreign commerce, I have no figures on the extent of their cargo that moves by truck.

The enforcement of the weight law would cause these steamship companies to divert a large cargo from Charleston to other ports. When you do that, it immediately affects the labor that is employed on the docks and also affects the money that is spent by the steamship lines in the City of Charleston, and that immediately affects the citizens of Charleston.

The Port Utilities Commission was created by the State of South Carolina to take over the wharves and docks at Charleston and also a switching railroad that connects with [fol. 137] the three railroads coming into Charleston. This Port Utilities Commission was also required to operate these wharves and terminals and develop the commerce through the Port of Charleston. If there is any lessening of the amount of traffic that will move through Charleston, it will have a decided effect upon the operating revenues of the Port Utilities Commission.

Judge Parker: Mr. Funkhouser, aren't we getting pretty far afield? Your inquiry is this, whether there is any relationship between this Act and the safety of the highways and the protection of the roads, and if the Legislature of South Carolina hurts Charleston by protecting the roads that is a matter in their discretion. The only thing we are interested in is whether or not there is such a relationship between this Act and the safety of the public using of the highway and the protection of the roads that the Act cannot be said to be unreasonable.

Mr. Funkhouser: Basically that is my understanding of the case, but there is one point, it seems to me you have not

covered. In testing reasonableness you show the effect, and another thing, I am here on an application for injunction, preliminary and permanent, and I have to show my damage, permanent, immediate and irreparable.

Judge Parker: Well, I would say to you that so far as the Court is concerned—I think I speak for the other members of the Court, and certainly for myself—you need not put any great amount of testimony in to show you will be damaged by being kept off the roads.

Mr. Funkhouser: There is another point, in making a record I don't see how I could go along—this Motor Carrier Act expressly prohibits discrimination against ports, towns and people, and I want to show the discrimination against the Port of Charleston.

[fol. 138] Judge Parker: I don't think that is what we are thinking about, and unless you can show me, we are not going to consider that point. The point is, just as I have indicated, whether this Act is reasonable. The Courts cannot supervise the general trade policies of the Legislature of South Carolina.

The Witness: The losses to which I have referred would occur when you had any lessening of commerce through the Port of Charleston, because it is true that when you divert traffic to another port, it takes years to regain that traffic, and during the time we are attempting to regain it, we are losing money.

Enforcement of the weight law will increase the taxes of the citizens of Charleston. The City of Charleston is bonded for the Port Utilities Commission in the sum of two and a half million dollars, and this Port Utilities Commission operates the wharves and terminals and a belt line railroad. So far, they have been able to pay their operating expenses and a proportion of the interest on this bond out of their operations, but if you reduce or lessen the traffic there, then they are not able to make the operating expenses, and of necessity the citizens have to be taxed.

The width limit of 90 inches imposed by the South Carolina law would have the same effect on the commerce as the weight limit. The width of most of the trucks and tractors and some trailers that come into the Port of Charleston carrying this interstate commerce is 96 inches, and the same loss would result from the enforcement of this width limit as from the enforcement of the weight limit.

The freight rates in the southeastern part of the country are somewhat higher than those in the middle west. If the truck competition with railroads was eliminated, the truck [fol. 139] competitive rates now in effect would go out and you would go back to the normal level of rates, which is higher than these competitive rates. This would mean that commerce flowing into, out of and across South Carolina would be carried at higher rates to the public.

I can cite you one example of that. We get rice from Lake Charles, Louisiana, that is bought by a concern in Florence, South Carolina. It does not stop at the Port of Charleston; it comes by steamer line to Charleston and then goes out to Florence. At the present time the railroads have in effect what they term a truck competitive rate from Charleston to Florence. This rate is 11 cents per 100 pounds. If you remove trucks and don't permit movement that way, there is no need for that truck competitive rate and you go back to the normal rate. This 11 cent rate is a minimum on 30,000 pounds. The normal rate is 22 cents with a minimum weight of 40,000 pounds; there is an increase of $55.00 a car.

The situation as to the higher rates in the southeastern part of the country has been a gradual process. In 1928 the rates were all revised in the southern part of the United States under what is known as the southern class rate investigation—that was class rates—but since that time we have revised the commodity rates. At the time the class rates were revised the level in the South was 25% higher than the midwest section of the country. That level today has risen to about 40% higher.

The truck competition with the railroads has tended to keep the levels of the rates down. If it were removed, this would be a detriment to the shippers and to the citizens of this State and section. I can point out some examples here where it will be to the shippers of Charleston. There are some concerns that handle linoleum moving out of Marcis Hook, New Jersey, to Charleston. They buy the shipments in quantities so as to keep the stocks active all [fol. 140] the time. That is moved in by truck. If the weight law is put into force, these shipments will have to move by railroad. They will have to buy in larger quantities and they will not be in the same position to compete with the competitors located in other states. That would create a burden on interstate commerce.

We have fourteen fertilizer plants located at Charleston. We manufacture enough fertilizer to ship it all over the states of Carolina and Georgia, but on account of the rate structure we are limited in the distribution of fertilizer, and we have been able by the use of trucks to make shipments of fertilizer into North Carolina and Georgia, but if this weight law goes into effect, then we will have to fall back upon our railroad distribution, and therefore, our area of distribution is going to be limited.

Cross-examination.

By Mr. Griffith:

I gave some percentages as to the volume of freight moving by truck in 1935 and 1936, which I compiled from records of the intercoastal steamer lines, their agents at Charleston, Street Brothers. I haven't with me any percentages for prior years. The trucks have reached their point of efficiency within the past five *five* years. There was some movement prior to that time, but not as much as in the last five years. Our records indicate that there has been a steady increase in the movement by trucks during the last five years.

Judge Northcott: I want to ask the witness a question. What, in your opinion, would be the effect on Charleston and the citizens of Charleston, and the port and taxes and all these various things you testified about, if the trucks put the railroads out of business?

A. Judge, we would be as seriously concerned about that as we would about the trucks. Our idea is, there is sufficient [fol. 141] for all as long as they are kept within reasonable limits, and we are anxious to see the railroads, the steamships and the trucks compete with each other under reasonable regulation.

I had occasion to look up the coal figures in a coal case which we handled before the Interstate Commerce Commission, and the coal going into Charleston annually in 1933 was 125,000 tons. No coal comes into Charleston by truck, because we are too far distant from the coal mines, over 450 miles from the nearest coal mine. Steamers take on coal at Charleston, we have bunkering facilities and a coal pier, and quite frequently ships come into Charleston for cargoes and also for bunkering. The total of 125,000 tons that I gave relates only to the consumption of coal in the

City of Charleston and to coal used by tug boats in the Port. That does not relate to the tonnage that moves through the Port.

Redirect examination.

By Mr. Funkhouser:

60% of all movements of cotton into Charleston is by truck; 40% by railroad. If the truck competition were removed and all cotton moving through Charleston went by rail, the cotton would seek other ports. The reason we have been able to control a substantial percentage of a cotton movement is because we can use the trucks, but if we can't, the cotton rates are going up to the normal basis and they are going to seek other ports where they can move it through.

(The witness recalled.) As to the actual tonnage of coal moving through the Port of Charleston (in response to question by Judge Glenn): There were for exterior movement from Charleston 36,778 tons in 1934, and 75,780 tons in 1935. This moved by rail to the Port and moved by ship beyond the Port in exterior trade.

[fol. 142] JOHN W. GERATY, a witness for the plaintiffs, having been duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

I live at Yonge's Island, Charleston County, South Carolina. My principal business is growing vegetables, farming and specializing in vegetable growing. In addition to that business, I am also an officer and an organizer of the South Carolina Produce Association, which is a cooperative farm organization composed primarily of the farmers or vegetable growers. This concern was organized in 1915. We have completed 21 years of business and for over 18 years of that time the South Carolina Produce Association was the largest shipper of vegetables in the Carolinas, and when I speak of the business, my own business is handled through this cooperative organization, as well as the other growers who are members, and over 90% of the total produced, the vegetable produced is shipped in interstate commerce. The Produce Association ships in interstate com-

merce. We operate principally in the coastal section, which is the market garden section of the State, Charleston County, Beaufort County,—we have had members in Georgetown County,—Horry County, Colleton County, and a few members in Hampton, but I would say 85% of our volume of business is in Charleston, Beaufort and Colleton Counties.

I am familiar with the South Carolina weight and width law on trucks. I have attended almost every hearing that was held while that law was being passed by the South Carolina Legislature. The enforcement of the law as to weight and width would absolutely debar the vegetable growing interest of the use of those facilities for moving our products, and it would mean the discontinuance or confiscation of our industry. We would have to go into other business or go bankrupt. We ship by refrigerator trucks. [fol. 143] If the law is enforced, I could not use a modern refrigerator truck for hauling products in South Carolina. Just at this point I would like to stress that the cost of transportation by truckers, and most of them have to move by refrigerator trucks, and the different growers and organizations do not own this equipment. We cannot afford to buy it, no more than we could afford to buy and operate a railroad. We have to depend upon securing this equipment for moving our class of products from large corporations who own this standard equipment. This equipment travels with the season. Some of the equipment we use is owned by corporations in Michigan, Wisconsin and New Jersey concerns and different states in the Union. They go to Florida, following the seasons up through Georgia and the Middle West and go where they have the stuff to move. Now all that equipment is standard. If the law is enforced there could not be one single piece of that standard equipment used in South Carolina, because it is all 96 inches wide and on account of the weight, we will simply be debarred from using the trucks. We could not secure trucks to use.

We cannot ship by railroad because the service that is rendered on a large percentage of our business by the trucks cannot be rendered by the railroad. It is a different class of service and a different kind of service. Our competitors in Georgia, Alabama—I mean the market gardens who grow the same commodities—ship at the same time and they could get the benefit of this truck service which is entirely different from railroad service and would give them

such a monetary advantage that it would amount to around anywhere from $50.00 to $85.00 an acre as against the growers of vegetables in South Carolina. Our records show that we don't average this profit per acre. It means that we would simply have to go out of business and it would go to our competitors who could use this equipment.

Judge Glenn: I meant, why could you not use the railroads?

A. Well, I will take—say, the shipments moving from the Charleston territory to the New York market. I will take that area because that distribution handles about 35 or 40% of our products. This is the difference. Our rate—[fol. 144] we will say—our rate by truck and the freight rate by rail is the same, but the service that is rendered is an additional cost when stuff is shipped by rail and it amounts to this; that we ship by truck and when we ship by truck, the truck loads at our packing shed in the field, goes to New York and unloads at the store of our consignee or the persons to whom we have sold or shipped the stuff. In the matter of schedules the truck makes a schedule of around 30 to 35 hours from our place to New York. The schedule by rail is a third morning delivery, nearly twice as long. If the stuff is shipped by rail, after it gets to New York it has to be lightered across and unloaded on the terminal. We have a terminal charge for unloading which figures at 1.2 per package. This is in addition to the freight rates. The freight rates are the same. After that stuff is unloaded on the terminal in New York, we have a cartage charge. It has to be carted from the terminal to the buyer or consignee. That cartage charge is eight cents a package. Then on account of the difference in length of time in transit, there is a difference of three cents a package in the cost of refrigeration, which makes a total additional charge when shipped by rail of 12 cents per package. The standard car load has 600 bushel packages, and you take in commodities like cabbage and spinach, that is just about the average yield per acre. The additional charge of 12 cents per package would figure at $72.00 per car or acre. Therefore, the growers of these commodities in South Carolina who cannot use these refrigerator trucks would be put at that disadvantage against his competitors in Florida, North Carolina, Georgia, and Alabama. That is, as far as equipment, schedule and extra charge.

About the lightest unit of the standard refrigerator equipment being used now will run from 12,000 to 14,000 pounds. That is the unit without the payload. As to the refrigerator, that unit will carry 450 to 500 bushel packages. Then to refrigerate that load you will have to use 5000 [fol. 145] pounds of ice. There are 13,000 to 18,000 pounds and under the present law, if enforced, that would reduce the payload you could carry, 2000 pounds at one point.

Judge Parker: What is the weight of those units?

A. The vegetables vary very much, but the average weight runs about 40 pounds a bushel. Say 500 packages would be 108, about 20,000 pounds. That would be that the unit and the load would give you about 35,000 or 36,000 pounds. But that is the smallest standard size refrigerator unit we use at all. There is much larger, but we have been using the equipment hauling from 400 to 520——

Judge Parker: Is that a single truck or trailer?

A. It is a single unit—but I don't think the Court has that clear. We have what we call a semi-trailer and what is called a four-wheeled trailer. The standard equipment is semi-trailer equipment. You have your motor and power in a short coupled power unit. Just your refrigerator truck sets on to that.

Judge Glenn: You have a six-wheeled unit?

A. Some six and some eight. Then you have three and four axles. A lot of the trailers have two axles under the trailer and two under the power units which gives you four and a lot of those axles have double wheels. You have eight wheels under the trailer, you see, you have six wheels under the rear end of the power unit which would be fourteen tires and two tires in front end, which distributes the load over the highway, and that is done to protect the highway. That evidence was taken in this hearing and was not refuted before the Legislature. It was stated there that these standard units loaded with that capacity that what damage was done to the highways is due to the number of bearings that an ordinary Chevrolet or Ford with five passengers would do just as much pounding or damage to the highways as this load distributed on standard [fol. 146] equipment with six wheels. That evidence was given at the hearing and they did not attempt to refute that.

We have two classes of buyers. The railroad service is just as necessary to us as the truck service. Now, to a

large buyer and a large operator, to the one using and buying a solid car load of one commodity, we must use the railroad service because his car can be shifted around without breaking the bulk, but 50% of the stuff is used by dealers who do not buy in solid car lots and to that man the truck service is indispensable and that class of buyers use over 50% of the products, and they demand that service.

If we were denied that service we could not compete with produce growers in other states. On account of the new freight rates on the general freight revision on perishables that became effective September 5, 1934—I think that is correct—that did away with discrimination on perishable vegetables from the western territory to the east. That is going to necessitate a very large percentage of the acreage of lighter vegetables, such as spinach, lettuce, carrots, and other stuff grown in Texas and shipped to the eastern markets, that acreage will have to be transferred to the eastern seaboard markets on account of the advantages. There is one large New York operator who was operating 8000 acres in Texas of these commodities. We were doing considerable business with him. He wanted in 1934 to transfer, as soon as the law became effective on September 5, 1934, to arrange to transfer that acreage and wanted to transfer that acreage to Charleston, South Carolina, area and have it grown by our organization, 8000 acres. On account of the truck law that was then pending, he said he could not afford to make that change until the matter was settled, because unless he could handle that stuff with those trucks he could not load as a result of the law, and that man has now located part of that acreage [fol. 147] in Florida towns near Tampa and part at Moultrie, Georgia, and there are 15 to 20 other large operators in New York who have to make some kind of transfers representing over 100,000 acres of these commodities.

If the law is not enforced in South Carolina, I think these growers will come into this State, because we have natural advantages. We have a better labor condition, better soil condition, and better climatic condition. If we are not interfered with by something arbitrary, we will have natural advantages.

Judge Northcott: Do you think the Court should consider whether North Carolina, Georgia, or other states getting this business is proper to enter into this case?

Mr. Funkhouser: I think that shows discrimination against interstate commerce.

. . . . . .

[fol. 148] The Witness: Since the advent of good roads and automobiles, communities have grown up in this State which produce vegetables where there has never been any railroad. On these hard surface highways that have no rail facilities there has been a large development of acreage devoted to the growing of vegetables for shipment to market. If these trucks were banished from the highways, they would not ship these vegetables.

The manner of conducting the produce business has changed remarkably since the advent of trucks, and particularly as to the broadening of consumption and cheapness, making the price of the commodity sufficiently low that a large percentage of the population can buy and use vegetables now that could not use them prior to that. As a result of that, less than carload shipments are sent to small towns by truck. In a town of as much as 2500 or 3000 population that town can not use a carload of mixed vegetables and under the present railroad loading regulations we cannot economically ship a car load of mixed vegetables to those small towns they cannot buy in carload lots.

Q. If he is compelled to ship by railroad, could they be shipped by rail?

A. At this particular point they could not, because there is not a consumptive demand to use them.

Q. That is, unless put in a larger car which would be prohibitive in cost?

A. Yes.

M. M. Stuart, a witness for the plaintiffs, having been first duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

I live at Shelby, N. C. I am in the motor transportation business with Barnwell Brothers, Incorporated, a plaintiff in this case. I am a stockholder and manager of our

[fol. 149] western division, which includes North Carolina and South Carolina. I am familiar with the South Carolina weight and width law, which has to a great extent prevented my company from operating in this State. We have ceased a good many of our South Carolina operations for this reason. In most cases, if we ship into this State, we ship through another company. If that law goes into effect, an operator attempting to come in and through this State would have to secure equipment for use only within this State; equipment to operate here could not be operated profitably in other states that have tire weight limits. It would be necessary to unload from large trucks to small trucks at state lines. For a profitable operation from Atlanta, Georgia, to New York, a truck would have to unload at the South Carolina state line, also unload and reload into a larger truck at the Georgia line; that would be two unloadings, and possibly two trucks to carry the same amount of tonnage through South Carolina that one truck would handle through the other states. That would increase the cost of transportation materially, because it costs practically as much to operate a small truck as a large one, the costs are of varying character, gas consumption, labor costs and the investment in the equipment. That would increase the cost of transportation to the ultimate consumer. A truck to comply with the South Carolina law would cost about 75% as much as a truck that would carry twice the amount of merchandise. The comparative total would be three to two.

My company operates under authority of the Motor Carrier Act, and has filed a schedule of rates with the Interstate Commerce Commission, in which we have taken into consideration the increased cost of operation in South Carolina. We have tried to comply with the law in South Carolina and for that reason, we have set up restrictions in our rates causing the rates on commodities which originate in South Carolina moving to the East to be considerably [fol. 150] higher than from some point in North Carolina, which ordinarily would take the same rate basis. As an example, the product of a cotton mill at Shelby, North Carolina, would be moved to New York at the commodity rate of 74 cents. On the same shipment from Blacksburg, South Carolina, about 15 miles from Shelby, to New York, the rate would be $1.14 per hundred pounds, a difference

of 50 cents. We are forced to discriminate against the business originating in South Carolina. A good bunch of the big textile shipments from Spartanburg moves by truck, but not nearly as much as the same type of commodities from North Carolina points. Gastonia, N. C., and Spartanburg, S. C., are comparable as to the amount of textiles produced. They have the same rate basis to the east. We make a difference now. On almost every kind of article, our rates from any South Carolina point under ordinary circumstances showing the same rate from similar points in North Carolina is considerably higher. Most of the commodities from Gastonia are cotton yarns to Philadelphia with a rate around 68 cents. That same commodity from Spartanburg by our line would be rated at third class or approximately $1.14 or right at that figure.

The excess cost means that the South Carolina textile shippers are not able to use truck transportation. They have to a great extent lost their markets. I know of lots of instances where they have already lost their markets.

If the South Carolina Act is enforced, it will not exclude the operation of tractors and semi-trailers, but it will reduce the size and the amount of tonnage they carry down to the point where it will not be economically profitable to operate that type. We could not operate them on a profitable basis, because we would not be able to carry enough payload to justify the increased cost of operating and the first cost of this type of outfit.

[fol. 151] As between a truck and semi-trailer under the South Carolina law, the amount of pay-load that we would be able to carry would depend on the weight of the empty vehicle. The truck in every instance ordinarily would weigh less than the truck trailer outfit. Taking two similar vehicles, the semi-trailer that will carry the same quantity that the truck will carry—that type of semi-trailer and tractor would weigh ordinarily, the smallest unit, about 12,000 pounds empty, and the payload would not weigh but eight to nine thousand pounds. It is the experience of the states who have small limitations, that the roads are full of small overloaded trucks which are much more unsafe than the type loaded properly and conducted along safe lines. Under ordinary circumstances, leaving out this law, a motor carrier would carry more of a pay-load on a semi-trailer than on a truck; but if the South Carolina law is

enforced, he will be compelled to carry the most pay-load on the truck and not use the semi-trailer. There is a better distribution of the load on a semi-trailer outfit. If the law is enforced, it would enforce heavier loads on vehicles which are not prepared to carry as good loads as tractor-semi-trailers, and it would create an unsafe traffic on the highway. That is the experience we have had in every state that has low weight restrictions.

If the law is enforced, the service rendered by trucks to the buyers in New York would be greatly hampered. The decrease in time of delivery of shipment is of the greatest importance. In the ways of conducting business, particularly of people carrying a very small stock of goods on hand, and in order to get in their supplies fast enough they have been forced to use truck transportation. Prior to the advent of the trucks coming into the picture, they could not get the service that they have today. They were forced to carry some thousands more in stock and inventory.

[fol. 152] Since the advent of good roads and motor transportation, the method of doing business has changed entirely. The retail buyer has reduced his investment considerably. We have customers who have been able to reduce the amount of money invested in inventories and stocks on hand by as much as $500,000.00. Truck transportation has been able to give them service on their supplies which has reduced time in transit more than one-half. They can get the goods quicker when they want it and don't have to wait on delivery, and don't have to buy and hold for future use. That change has come in the last four or five years, since the development of motor transportation.

Most people are employed in South Carolina in the textile industry, outside of agriculture. If the State law is enforced, the mills in South Carolina cannot compete on the same basis with other mills in the country if they will not be allowed to run or get their proportion of business that they ordinarily would, thereby creating unemployment.

I think about 75% of the textile products in North Carolina are transported from the mills to their markets by truck. I think the figures in South Carolina are just about the reverse, only about 25% of the textile products move by trucks. This difference has been caused by the fact that motor transportation has been denied to the people of South Carolina to a great extent.

Approximately two hundred trucks are operated by my company, which was organized in 1930 and has been in business since that time, handling mostly textile products from the Southern mills for New York markets. We operated two trucks in 1930. We have had two hundred trucks since January 1, 1936; our business has grown from two trucks to two hundred trucks in those years. That situation is generally true with the large trucking companies. There [fol. 153] is a revolution in transportation, and practically all of it has taken place in the last five or six years. It has changed the method of doing business in the country to a great extent. I think that is a natural development; it is as natural as the growth of the railroads when they replaced the former method of transportation—when the canals could not give service the railroads gave it. Now the trucks give service the railroads cannot give.

Cross-examination.

By Mr. Griffith:

The large development in the use of trucks for transportation is general among the operators the country over. A great many of such operators have increased much more than my company. I think that our company is an average as to the increase in business, that we are just about the average.

Our line of trucks, the trucks that are principally in the business of handling shipments over long distances from New York into the South here, weigh in the neighborhood of 16,000 to 17,000 pounds empty, truck and trailer. Our loads average on those trucks around 16,000 to 18,000 pounds, on the average; sometimes they are loaded as high as 20,000 or 21,000 pounds, but we are still within the law in the various states when they are loaded to that extent. Our axle weights when loaded are less than 18,000 pounds per axle—I cannot tell you exactly. You can figure it—there are three axles per unit. This front axle does not bear as much weight as the middle axle, and the middle does not exceed 18,000 pounds. I would say that our axle weight is somewhere around 18,000 pounds per axle, and we stay under that.

Redirect examination.

By Mr. Funkhouser:

As to the axle about which Mr. Griffith asked me, with the exception of the front wheels, there are two tires on each end of the two axles. The trailer has ten tires. Four tires [fol. 154] on the axle distribute the load better than two; it increases the amount of surface there is on the road. We use low pressure, pneumatic tires, balloon. I don't think they damage the road as much as high pressure tires. Our largest units are 96 inches, outside width measurement. That is the new equipment we have bought in the last two years, which is standard. Our pay-loads average from 16,000 to 20,000 pounds per load on our largest units, more often about 17,000 or 18,000.

96 inch wide trucks have been standard in North Carolina for only the past two years; practically every northern or eastern state has had 96 inch width or more all along, since any regulations have been in effect, since we started going into New York territory six years ago—those regulations were in effect then. The extra width increases the cubic capacity. It allows us to load much more thereon and especially is that valuable when there is bulk. They have to be longer and narrower, because you can get three or four lines of cases in there but with only 90 inches maybe you would lose two feet. Our experience has not shown that the extra width makes the trucks more dangerous to operate on the road. Our experience has shown that the lighter trucks are much more unsafe than the heavy ones. We have about 25,000 miles of actual road mileage per day and we keep several men to keep our cost accounting and observation, etc., and we have had much better experience on larger units than on small ones. Our ratio of accidents has been less. The same principle applies in a truck that is correctly balanced as it does in an automobile. For instance, a 6,000 pound Cadillac car can be handled on the road and stopped quicker at 60 miles an hour than a Ford can weighing 3,000 pounds. In other words, a small light car traveling at an excessive rate of speed cannot be handled on the road or stopped as quickly or as safely as a much heavier car. This is so at a higher rate of speed. I don't know why, but it is true, and the same thing applies with the truck. If a truck

[fol. 155] is correctly balanced, in other words, the ratio of the weight of a truck is correctly proportioned to the weight of the load, if it is correctly distributed over that entire medium it is much safer than one that is top heavy or a small one that is greatly overloaded. The extra space that the tires occupy on the road, the extra braking powers that the big trucks have, much more than compensate for the momentum of the truck because of the extra load. Our trucks have brakes that will stop the truck at 50 miles an hour, even though it tears the tires off the truck.

The trailers in most instances are about 25 feet long. They are ordinarily about 38 feet all over. I think the South Carolina law with respect to length is about 45 feet—it used to be. (Mr. Funkhouser advises that it is 35 feet.)

We operate from New York through Pennsylvania, Philadelphia, Delaware, Maryland, District of Columbia, Virginia, North Carolina, and principally some, in this State. We have rates in effect all over the territory east of the Mississippi River, joint rates in effect with various carriers over the entire eastern section, so that any shipment can be transported at a certain through rate—there are various carriers. If the South Carolina law were enforced, I don't think shipments could be made through South Carolina on those through rates; they could, provided it is done on the present rates. I think it would be necessary to increase the rates in South Carolina.

My company hasn't had any interchange of equipment with others, as where a truck is loaded in Boston or New York and is transferred to another company at a certain point, but it is very practical to do that if the regulations would allow it. The Interstate Commerce Commission has considered the possibility of that, I think, and suggested [fol. 156] that it be done. I think they have the power to do so. If that could be done it would enable us to give a much quicker service to our customers because loads could be loaded at the point that they originated and sent direct to the point of destination without any terminal transfer, or reloading. This would require only changing drivers, supervision, and responsibility.

[fol. 157] R. W. Knowles, a witness for the plaintiff, having been first duly sworn, testified:

Direct examination,

By Mr. Funkhouser:

I live in Cleveland, Ohio, and am employed by White Motor Company as a Transportation Engineer. I have been sixteen years with the present company. A transportation engineer has as his duties the examination of hauling operations of a number of operations and presenting the economic picture found thereby as well as buying equipment to meet that competition. I design combinations of vehicles to meet a particular situation, for example, tractors and semi-trailers with particular design of bodies to meet the particular condition.

The standard tractor-trailer used in the Interstate Commerce today is ordinarily designed to carry about 18,000 pounds per axle and sometimes a little less; usually 16,000 to 18,000 if a state law permits, which most of them do. I select 18,000 pounds per axle as a basis in designing the cars because most of the states permit this, and the various authorities, such as the American Association of Highway Officials, have subscribed to that weight per axle. The American Association of Highway Officials have recorded themselves as being in favor of no gross weight limit, but weight per axle limit.

As an engineer, I do not believe that gross weight in any way protects the highway. For example, if I might explain my idea: If there were two trucks, one proceeding behind the other, and each had one axle with 18,000 pounds limitation on it, whether those two trucks were independently propelled, pushed by hand, or one pulled the other, by means [fol. 158] of chains, cable, or bar, the effect on the highway would be practically the same. If the front axle were removed from the picture, throwing the support on the back of the other truck, having its body suitably disposed to permit that, then the weight on the axles would distribute —their effect on the highway would be the same standing or operating on the highway. The weight of the vehicle affects the highway in relation with the contact of the tires on the road; it is transmitted to the highway through the axles and tires.

In designing an automobile, we do not consider the gross weight as to the highways, we are concerned with the axle weights.

In designing tractors and semi-trailers for bridges, the common accepted procedure is to see that the axles are so spaced to the weight on the axles that they will comply with the formula, that the length between the front and rear axles, plus a space usually 40 center dependent on the type of bridge, shall not exceed a certain figure. There is a standard formula used by highway engineers and other engineers to determine that.

(The witness is handed a pamphlet entitled, "Who Shall Use the Highways and How," and is asked who makes up that Association.)

I believe that has been stated by other parties. My understanding is that it is the highway officials of the several States who, I am advised, work in connection with the Bureau of Roads. It contains specifications as to what weights the roads ought to be designed to carry. I understand that the Bureau of Roads concurs in that.

Q. Will you look at that and state to the Court what axle width is provided in there?

[fol. 159] Judge Parker: Wait a minute. Your adversary has not objected, but I told him he need not object.

Mr. Davis: That is not competent evidence.

Mr. Funkhouser: I want to make the point that the Association interested in highways and also the Bureau of Roads have agreed on that as a standard at the present time.

Q. Do you know about who has approved those recommendations in there, what they mean and whether or not that is a standard at the present time?

A. I know that I have read and studied this to some extent, and the regulations herein are substantially the same as they have been by this body for sometime and that the general recommendations are concurred in by the AMA right recently.

Q. What is that AMA?

A. That is the Automobile Manufacturers Association. Might I quote one sentence from this on page 9, "Highway stresses are ruled by wheel loads and not by gross loads."

Judge Glenn: That is your view, too?

A. Yes.

By Mr. Funkhouser:

Q. Will you read what it provides as to axle weights and recommendations?

A. (Reads:) "Axle load: The wheels of all vehicles, including trailers, except those who operated at 10 miles per hour or less, shall be equipped with pneumatic tires. No wheel equipped with high pressure, pneumatic, soled rubber or cushion tires shall carry a load in excess of 8000 pounds, or any axle load in excess of 16,000 pounds. Research indicates that the low-pressure pneumatic tires can carry 9000 pounds per wheel without increasing pavement slab stresses. An axle load shall be defined as to total load on [fol. 160] all wheel- whose centers may be included between two parallel transverse vertical planes 40 inches apart. These limitations are recommended for all main rural and inter-city roads, but should not be construed as inhibiting heavier axle loads in metropolitan areas if any State desires."

In my opinion, safety on the highway will not be enhanced by 20,000 pounds limitation. For this reason, among others, a vehicle having gross weight of about 20,000 pounds can carry approximately six ton pay load and a properly constituted semi-trailer whose axle weights are kept within the pounds as set forth by the AMA Highway officials, namely, 18,000, can carry a pay load of about 24,000 pounds. That is twice; consequently to move the same total tonnage of merchandise in interstate traffic or any traffic would require about twice the number of vehicles and using twice the number of vehicles would mean twice the opportunity for hazard. You would have twice as many vehicles operating at any rate, and if they are equally well constituted as to brakes, tires and manufacture, were of equal structure, there would be twice the hazard of meeting with some other vehicles. From that standpoint, I cannot see that safety would be enhanced.

Judge Parker: Does not the smaller unit prevent greater damage than the larger unit?

A. No, sir. It is true that certain tractor-semi-trailer combinations have been set up which are not safe. It is also true that many straight trucks are not safe, but if the weights per axle are kept within proper balance as defined by the body of Highway Officials and the others subscribing to it, namely 16,000 pounds, if they are properly equipped with brakes so that they can stop within a given number of [fol. 161] feet, then there is no more hazard on the road with one vehicle, than by a truck conveying equipment——

Judge Parker: Is there not more difficulty in the driver seeing around one of the long ones coming when he passes them on the road?

A. His passing them on the road is a matter of relative speed of the two vehicles and the freedom of the road to pass and the judgment of the over-taking driver as to whether he has proper space and the conditions in which to pass.

Judge Parker: The question I have in mind is this. Is not the larger unit of that sort a greater menace to the other travelers on the highway for the reason that passing on portions of curves, it is almost impossible to get a proper view of the highway?

A. This same Association advocates a limit of 45 feet in length and some trucks can be set at 45 or if not 45, then certain loads such as lumber, logs, might exceed the figure even at 30,000 pounds, you have the same length hazards.

By Mr. Funkhouser:

The Witness: The longer vehicle is more dangerous than the shorter one in passing. It is possible that one 50 feet long is more dangerous to pass than one 25 feet long but, of course, it does not hold of necessity.

Q. You have more distance to travel on the opposite side of the road the longer it is.

A. You should have a greater open space in which to let that passing, but that is in the judgment of the operator who wishes to overtake it. There is no difference in hazard between a tractor-semi-trailer of 45 feet length and two [fol. 162] trucks of 20,000 pounds, whatever their length, one behind the other, carrying the same pay-load tonnage because in either event you will have to pass the same length as the other.

In my opinion, vehicles of proper types, carrying approximately 40,000 pounds can operate as safely on the highways as trucks with gross loads of 20,000 pounds, because today we have power applied brakes on any combination axles, so that each axle and wheel of the vehicle can be stopped in the same distance with the same adhesive power, as if it were. Consequently the ability to stop is equally as safe. There have been vehicles constructed in the past when those brakes were not as safe, but not any more.

There has been a very considerable revision of the manufacture of automobiles in the last few years. Rather generally, by virtue of the availability of axles, heat treatments, etc., vehicles are now made lighter than formerly, — have the same strength. The advent of pneumatic and particularly low pressure tires has permitted you to do certain things with superstructure that has not been done prior. There has been a pronounced evolution, if not revolution in metals used in cars. There are metals available today for use in automobile construction that were not available three years ago, which makes it possible to do certain things for safety and strength.

The enforcement of a 20,000 pound vehicle law would affect highway costs in this way: As compared to a tractor-semi-trailer combination having its axles limited in weight according to the regulations of the same highway officials to 18,000 pounds, the tractor-trailer unit would or could carry safely about double the pay load. The cost per ton [fol. 163] of the two units would be about $1.00 in the case of a single truck unit limited to 20,000 pounds, because of the influence of the items of depreciation, insurance, license fees, drivers' wages, etc. As to the relative cost of highway maintenance:

Take one truck of a gross load of 20,000 pounds against one tractor-semi-trailer combination of 40,000 pounds— there may possibly be some relation there that I am not prepared to argue on, but it has been stated by people in that line of business for years that there is no difference in moving the requisite number of units for the tonnage over the highways at less, or the same number of units, provided the axle weight is kept within the proper bounds.

Semi-trailer combinations do not have to be highway hazards as compared with trucks. If they are properly constituted with their weight distribution per axle as advocated by the Association highway officials, etc., and their bodies subscribed to their findings, if they have brakes and adequate tires and — adequately constructed. The air brake has been in use on the semi-trailer-and truck combinations, possibly in a small way, for seven or eight years, and in a very pronounced way for the last five years particularly. I would be inclined to say that proper regulations concerning brakes would put the combinations on a par with the trucks, provided again, the weight per axle is cut down.

Cross-examination.

By Mr. Griffith:

I am not prepared to answer whether all highway engineers agree with my opinion. I don't know that I know all engineers. Those engineers having to do with the question in a public way and recognized by the industry generally, have agreed. None of them have expressed themselves in disagreement. [fol. 164] I have the statement of the Association of State Highway Officials and of the various officials in writing. Mr. McDonald of the Bureau of Public Roads is to the same effect. My own experience indicates that. I don't know of any contrary opinion; but I don't know the opinion of all engineers,—there may be thousands of engineers. I don't know what their opinions are.

Harry Tucker, a witness for the plaintiffs, having been first duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

My name is Harry Tucker. I am professor of Highway Engineering in North Carolina State College, and Director of the Engineering Experiment Station at Raleigh. I have been professor of highway engineering at North Carolina State College since 1921. Since that time, I have had intimate association with a number of the committees and organizations engaged in highway engineering work in the country. In addition, I have had some practice myself in highway engineering, that is, in the designing and construction of roads and streets. I am a graduate of Washington & Lee University. I hold degrees B. A., B. S., and C. E. I have charge of courses in Highway Engineering and Highway Economics. I teach all of the elements connected with highway engineering, including the location and design of highways, the operation of highways, that is, the operation of vehicles over them, the maintenance of highways, and those subjects properly belonging to a course in Highway Engineering. I teach them all.

I am familiar with the design of highways of different types. Concrete, or its equivalent, is considered standard

for main highway routes. The gross weight of a motor vehicle does not enter into the design of a concrete [fol. 165] highway or its equivalent. The design of a concrete pavement is based on the area of contact between the wheel and the pavement itself. That is, the gross load of a vehicle is transferred to the pavement through the wheels. Now, the wheel load is the thing that causes the damage to the highway; conversely the highway is designed to withstand a certain wheel load, without damage. The gross weight of vehicles has nothing to do with conserving the highway. It is the wheel load. The pavement is designed for certain wheel loads and, of course, certain axle loads. The wheel load is developed for the axle load, and if those loads are not exceeded, then the gross weight of the vehicle has nothing to do with conserving the highway or the cost of maintaining it.

I am familiar with some of the main State highway routes in South Carolina. I could give you a list of the ones I am familiar with. I have examined some of the South Carolina State highways. I went over certain roads in the State, and didn't pick them out,—didn't know much about the highway system in the State, and consequently did not pick out any particular road with malice aforethought, with any particular plan, but the roads I went over are the finest I have been over in recent years. They were well constructed, the shoulders well built, quite different from the way they are built and maintained in our State; the drainage good, and I didn't see any evidence of undue deterioration of the pavements from traffic. It is almost impossible to say what causes a failure of a pavement, especially a concrete pavement, there are so many factors entering into it. I will say that in a general way, without examining [fol. 166] every point in the system that is affected, that in a general way I saw no evidence of undue deterioration, —that might cause maintenance,—because of the heavy trucks, or trucks at all that come on these pavements. If heavy trucks were going to damage the highways and those trucks used those highways for six years, I think the damage would begin to show up.

Q. Using the concrete roads as typical,—what sections were used in the South Carolina highways you examined?

A. Well, of course, it is understood I didn't,—I was unable to dig a hole in the pavement, or drill a hole and get the thickness of the pavement. I got this information from

the highway department. I understand two sections were used on the road I examined, a 7½-6-7½, which means 7½ inches thick at the edge, six inches thick in the center, and 7½ inches thick at the other edge; and another was 8-6½-8, —8 inches thick at the edge, 6½ inches in the center and 8 inches at the other edge. I am informed by the Highway Department those are the two sections used on the concrete roads I examined.

Judge Parker: What concrete roads did you examine?

A. I will be glad to tell you. I went from Charlotte, in this examination to Spartanburg, Greenville, Anderson, Greenwood to Aiken, Batesburg, Charleston, Kingstree, Florence, Cheraw, and on route 52 to the North Carolina line. There is no particular town there that identifies it. I think without question these concrete roads that I examined will carry a wheel load of from 8,000 to 8,500 pounds, or an axle load of 16,000 to 18,000 pounds safely. As to how we determine that, we have methods developed originally by Mr. Clifford Older, by the Bureau of Public Roads, by Mr. Westergard, of the University of Illinois, by which knowing the thickness of a pavement and the strength of the concrete out of which it is constructed, we can determine [fol. 167] the wheel load, and therefore, the axle load, which that pavement will carry. There is no cumulative stress caused by the three axles of a semi-trailer-tractor combination. These three axles, if carrying the same load, each causes a stress in the pavement independently of the other axle. In other words, the three axles do not increase the stress.

Judge Glenn. In other words, take a given square inch on the pavement, the minute, the moment, the second the wheel passes off, the stress is all over?

A. That is correct. There is a limitation, as you perhaps know, the axles must be separated by 40 inches. If they get closer than 40 inches, my statement doesn't apply. They must be separated by at least 40 inches.

The axles of most of these trucks, trailers, tractors and semi-trailers engaged in interstate commerce, are absolutely separated to that extent, 40".

I have analyzed the road sections used in South Carolina and found that the road sections with minimum thickness at the center of six inches is good for the axle load of

16,000 to 18,000 pounds, so that with a tractor-semi-trailer combination, with three axles, the road will carry approximately 40,000 pounds gross; on the rear axle of the tractor and rear axle of the semi-trailer would be 16,000 pounds each, and on the front axle would be 8,000, that would make a gross of 40,000 pounds. If we add another axle to the vehicle about which we are talking, providing you could get it on there 40 inches apart, it would increase the gross load to 56,000 pounds without doing any additional damage to the pavement. These roads I examined would absolutely carry that load.

[fol. 168] I have made a study of highway accidents,—have lectured, written and talked on that subject. I have specialized somewhat on the subject. I have data that will give the relative frequency of accidents according to the type of vehicles and have made studies in that regard.

Judge Glenn: What territory is this data gathered from?

A. I have it for any territory you want. I have it for the whole country, and I have it for North Carolina, and I tried to get it for South Carolina, but the Highway Department wouldn't let me have it. I have been up there twice trying to get it. I think it would be well to use North Carolina because it is contiguous to South Carolina. For passenger cars the number of accidents, including deaths and injuries, are 12.64 per 1000 vehicles. For commercial vehicles, the accidents, including deaths and injuries, are 8.03 per 1000 vehicles, so that is the relative ratio on the basis of number registered, in North Carolina. The same figures apply roughly to the whole country. As a matter of fact, that isn't fair comparison, because it should be on the basis of mileage, the number of hazards that occur is dependent on mileage. I have the figures for various vehicles for the whole country on the basis of mileage. If you want them, I will be glad to present them to you.

(Mr. Funkhouser requested the witness to do so.)

For passenger vehicles, the figures for the whole country is one accident, including death or injury, per 100,000 vehicle miles. That does not take into account other types of accidents. We must remember that there are some 25 to 50 accidents involving property damage to every accident [fol. 169] involving death or injury. We haven't any data on that, but that is roughly the ratio, so that we can say

there is from 25 to 50 accidents of every description per 100,000 miles traveled for passenger vehicles in here. Then, vehicles for commercial vehicles; busses 2.66; trucks, building materials, 1.49, that is per 100,000 vehicle miles; inter-city trucking, 1.69; laundry 3.58; bakeries 3.69; department stores 4.38; newspapers 6.80; coal and ice 7.10. That table, those figures, are presented there to bear out a statement that is frequently made that for commercial vehicles the accident rate is much higher for vehicles engaged in local deliveries more than anything else. You probably got that out of the figures I read.

I do not have figures for those trucks engaged in interstate commerce. They are not broken down in that form, but are included in the general term of commercial vehicles. I have no data as to trucks as distinguished from other vehicles. Passenger cars and motorcycles have the highest accident frequency. Commercial motor vehicles have the lowest of all vehicles. Commercial vehicles would include these interstate trucks. I don't recall whether bakery vehicles have the highest frequency; newspapers 6.80, and coal and ice 7.10, that is, ice trucks have the highest frequency. The figures are not classified according to loads, but I would think that coal and ice trucks with their loads weigh under 20,000 pounds, as a rule. I think most of these coal and ice trucks operate in the city and in areas contiguous to cities. Of the commercial motor vehicles, those making deliveries, local vehicles, more or less, have the highest accident frequency, and commercial vehicles engaged in long distance hauling, including these busses and trucks, have the lowest accident frequency.

[fol. 170] I explain this conclusion in this way:

I made some study of the methods in use by these organizations engaged in commercial transportation. They have safety departments where the importance of careful driving is emphasized. They check their equipment—they get good equipment to begin with—they are very careful about employing their men; they employ only experienced men, and they are very thoroughly disciplined and I think that is responsible for some of the records made by the commercial organizations. For example, one of them operating 59 units, that according to information furnished me, has not had an accident of any kind since September, 1934. I think that is remarkable, and I don't see how it can take place.

I think that proper weight distribution on trucks and semi-trailers is important because safety on the highways these days, at the speeds motor vehicles are operating, and hazards and emergencies developing so quickly, the important thing is stopping when the emergency develops. These modern vehicles, the tractors and semi-trailers are equipped with duel wheels, power brakes, and very careful to see that loads are uniformly distributed, and that is not entirely unselfish; by distributing the load properly the wear on the tire is uniform, but all those things increase the safety of operation. The result is the vehicle can be stopped very quickly when the emergency developed. I can't see how proper distribution of the load is encouraged by a law which has just a gross weight limitation, because under that law the load need not be properly distributed.

Cross-examination.

By Mr. Griffith:

The formula that I referred to was a formula developed [fol. 171] by Mr. Clifford Older some years ago, I believe formerly Chief Engineer of the Illinois Highway Commission, that has been modified by certain tests on the part of the Bureau of Public Roads, and particularly investigations conducted by Dr. Westergard, at the University of Illinois. From the result of all the work that has been done along those lines, it is possible for us now to use formulas to determine the thickness of a pavement to carry a certain load, or conversely, to determine the load a pavement of certain thickness will carry. Mr. Clifford Older was a pretty prominent engineer, so far as I know. That was some years ago. He was one of the pioneers in the design of concrete pavements.

Redirect examination.

By Mr. Funkhouser:

As well as I recall, it was Mr. Older who was one of the first engineers to develop this theory of axle loads for highways. Comparing the highways of South Carolina with the highways of North Carolina, as to the ability to carry weights of these vehicles, I consider the highways of South Carolina, the concrete roads will carry the loads just as

satisfactorily, the same load, and without as much damage as they would in North Carolina. In fact, they have been carrying these loads and I think our North Carolina roads are in much worse condition than those over which I traveled in South Carolina.

I do not consider the condition of the roads in North Carolina to be due to those heavy trucks. There is quite a difference in the method of constructing concrete roads in North Carolina and South Carolina. I will be glad to explain it if you want me to go into it. There are so many things that cause the deterioration of a concrete pavement that it is impossible to say it is due to this cause or that [fol. 172] cause in any case. I would say in North Carolina we have subgrade conditions quite different from the subgrade conditions in South Carolina, for one thing. There is a wider topographical condition there in the mountain section. We have conditions quite different from other sections. From my observation, the subgrade conditions in South Carolina are most excellent. As to the weather conditions in South Carolina, as compared to North Carolina, of course, in North Carolina, in certain sections we have the frost going down quite deep into the ground and that makes quite a difference as to the qualities of a concrete road. There isn't much depth to the frost in South Carolina, if there is any in certain sections.

Evidence Introduced in Behalf of the Intervener, Interstate Commerce Commission

L. W. TELLER, a witness in behalf of the intervener, Interstate Commerce Commission, having been first duly sworn, testified:

Direct examination.

By Mr. Ross:

My name is L. W. Teller. My residence is in Chevy Chase, Maryland, a suburb of Washington. I am employed by the Bureau of Public Roads, as an engineer. For the past seventeen years I have been employed by the Bureau, in the Division of Tests, and for approximately ten years I have been in charge of their researches in pavement design. In the course of that work, we have conducted many

tests and research investigations endeavoring to develop information that would aid us in the better design of highways, and a better understanding of how highways function under the loads that they have to carry, and in the course of that work we have made stress determinations in [fol. 173] pavements in surface, as well as in pavements that were built for particular test purposes according to designs we have in mind.

For about ten years I have been in direct charge of the section of the Division of the Bureau which conducts those experiments and tests covering rigid types of pavement. I have two engineering degrees, Bachelor of Science of Civil Engineering and Civil Engineering, from George Washington University. I have perhaps twenty or twenty-five published papers on this general subject, many of them directly on this subject.

Q. Will you tell us a little more as to the purpose of those tests?

A. Our aim is to find out the loads of traffic and the other changes to which pavements are subjected; how we can use the material in the most economical way, and how we can construct these roads so that they will carry their burden with the least distress, and we have used the rigid pavement as an index because it is an elastic material,—concrete is an elastic material which is subject to engineering laws, and we can analyze the effects of loads on it, and we have used pavements of many designs and many thicknesses and applied loads to them in many ways in order to determine such things as the effect of the magnitude load, the effect of the area through which the load is applied to the pavement, and other factors that affect the final result, and we have measured the effect of those loads on the pavement by actually measuring the strain in the concrete; that is an index of the burden that we are putting on the pavement. We know how much we can stretch it when it breaks. We know how much we can stretch it and use it and not have it break. That is the general nature of our research. [fol. 174] Q. Have the results of those tests been utilized to any extent in the specifications and standards which the Bureau of Public Roads will approve for highway construction?

A. We are not the only ones that have been studying the effect of loads on pavements, although I believe we have

done more work than anyone else, but those results are published through our monthly research journal, Public Roads. They are also published in the proceedings of the highway research board, and those reports, with other reports, have an influence, although it is not always easy to say that from this year on the results of these tests caused certain changes in practice, but the evidence is that the information that has been developed by our tests and other tests has been applied in the pavement designs that are in use today.

Q. Did you hear Dr. Tucker's testimony as to the design and cross-section of the South Carolina paved roads?

A. I did.

Q. Does that conform with your information as to those cross-sections and designs in this state?

A. That is in accordance with my understanding of those designs.

Q. Do you have any information, or what information do you have as to the designing of the cross-sections of paved roads, generally, throughout the country with reference particularly to how much variation occurs? Speaking broadly, of course.

A. I will speak broadly, but it is in connection with my work. It is necessary that I keep fairly well informed as to what the practice is in the various states, and the design that was described by Professor Tucker is not radically different from the designs that are being used in the vast majority of the states in the country for concrete pavement [fol. 175] cross-sections. Really there is not a great range in thicknesses, as used in the states throughout the country.

In general, I would say that by far the greatest majority of states with sections, that in the interior the slab was from six to seven inches in thickness.

Q. The South Carolina design then would fall about in the average for the group, is that correct?

A. It would seem to me it is quite a typical design.

Q. Is it your opinion that it is the thickness of the center of this design or slab which is the governing factor in strength?

A. The edge of the thickness is important only if we can conceive that the wheels of these heavy vehicles are confined to the extreme edge of the pavement, and modern motor vehicle speeds,—we all know the majority of the loads are

not traveling along the extreme edge of the pavement, and in my opinion the effect of these loads on the interior area of the pavement is probably the critical condition we should consider.

Q. Will you state your opinion of what gross load the South Carolina paved roads we heard described, will stand?

A. Well, as has already been brought out, the gross load is not a factor in pavement design. The axle load is perhaps a better factor to use, but the critical factor on which a pavement must be designed is the wheel load, because we have no guarantee that even if we specify axle load that the axles will be equally loaded and the wheel load equally loaded. The load that is applied to the pavement through the wheel is the load for which the engineer must design the pavement.

Q. What wheel load then would it be your opinion the South Carolina paved road type described would stand [fol. 176] without undue stress or undue damage?

A. There are many factors that effect that relation of the wheel load to the structural behavior of the pavement, but in my opinion the application of a wheel load of the order of 8,000 pounds, through proper pneumatic tire equipment for that wheel load, would not stress the pavement within a half of its breaking strength.

Q. Do you have information as to what the wheel load restrictions are in effect in the majority of the states?

A. I am not an expert on that, either, but in this work that we do we try to keep pretty well informed as to that also. I have been in charge of the motor vehicle impact researches of the Bureau for a great many years, and that is an important part of that work, and my impression is that by far the large majority of the states will permit a wheel load of 8,000 pounds or more on proper tire equipment.

Examination by Mr. Funkhouser:

Mr. Thomas H. McDonald is Chief of the Bureau of Public Roads. To my knowledge, he has been connected with the Bureau since 1916. I can't give you a more exact date. He is the gentleman in charge of the Bureau that distributes the Federal aid to the various states. He functions through the Secretary of Agriculture, of course. It is a bureau of the Department of Agriculture. As such official,

I believe he has testified before Congress a number of times, and also before the Interstate Commerce Commission. He is my superior.

Cross-examination.

By Mr Griffith:

It is necessary for an engineer when he comes to construct a road and design it, to know what burdens it is going [fol. 177] to have to bear; that would be the starting point of paving design; like building a house, you must know when you start the foundation how much weight you are going to put on it. I have no knowledge of the designing of the highways of this State.

I knew Mr. Charles H. Moorefield, by reputation only. I believe his reputation was most excellent. I do not know what portion of the roads of this state are concrete roads. I do know that some of the roads within the State Highway System are what they call bituminous surfacing, because I saw some of them Sunday. So far as I know the weight that can be permitted on pavement of the bituminous type cannot be determined analytically or by tests. I do not know as to what weight should be permitted on them. I do not know as to the dirt type of roads within the State Highway System or anything about their designing or what weights they could properly bear; and, of course, I do not know anything about the mileage of these roads. I am not acquainted with the design of the bridges throughout the State Highway System of South Carolina.

(Asked to give his opinion as to what load the roads in South Carolina should bear, speaking of all the roads in the State Highway System:)

I don't believe that there is anyone that could go over the roads of any State Highway System and say that this road is good for so much, and this road is good for so much and the other road is good for so much. The concrete pavement is the only pavement that we have a means for rational design. The design of the other types must be based on the observation pavements of that type, under the conditions in which they have to serve under the traffic they are bearing, in my opinion.

My testimony so far as concrete pavements is concerned [fol. 178] is opinion based on a very considerable amount

of testing data. That is, data derived from tests conducted, with such records as we are talking about, on such type of pavement as we are talking about. I confine my opinions entirely to the concrete road. My testimony as to what these concrete roads can bear is my opinion based on test data, and I don't believe any other reputable engineer would come to another conclusion from those tests today.

I don't think that I made the statement that the gross load limit has no connection with the protection of the road. My statement was intended to convey the idea that when we came to design a concrete pavement, we were interested in the wheel load that was applied to that pavement, and not in the gross load of the vehicle concerned, provided, as was brought out before, that the axles carrying these vehicles are 40 inches or more apart, and that was established by tests made under my direction.

Q. Let me make it clearer. Under 20,000 pounds gross weight limitation, would it be possible ordinarily to put a greater load than 8,000 pounds on any one wheel; wouldn't that in itself——

A. (Interrupting:) I doubt it very much.

Q. That would limit the wheel load to a maximum of 8,000 pounds, wouldn't it?

A. I believe it would.

Q. That would limit the wheel load to a maximum, but it would permit just about such a weight, wouldn't it, on the ordinary two-axle?

A. I would expect to find about 6,000 pounds on the rear wheel, but there may be vehicles so constructed that there [fol. 179] is a larger proportion on the rear end than the normal vehicle.

Q. Do you know what percentage of the weight is on the front axle and rear axle?

A. I know we have weighed a good many of them. Recent designs have been changed and have changed the relation somewhat, but in general, there is from sixty-five to eighty percent of the load on the rear end. Now, the most recent data with which I am familiar, and the trucks we have been using in our tests, was that there was about one-third on the front end and about two thirds on the rear end when we had a capacity load on, and the reason for that was we had two tires on the rear and one on the front, and the designer figured each of those tires should carry the same load.

Q. But in your former testimony, you did find some of the vehicles carrying 80% of the load on the rear axle?

A. There have been such vehicles designed, I believe.

Redirect examination.

By Mr. Ross:

Q. My questions as to design of roads was directed to rigid type roads, I believe?

A. That's right.

Q. In most of your answers to counsel, he was talking about concrete roads. Is there any distinction there?

A. The rigid type road in our terminology covers pavements that have slab strength. The concrete pavement is the usual example of that, although a concrete base that carried a bituminous top, such as is used in some city pavement, might also be considered a rigid pavement, although composed of the two materials, but the rigid pavement type is confined to those that have slab strength, in our terminology.

[fol. 180] Q. So that when you were speaking of concrete roads, were you including this type you just talked about?

A. Well, we are talking about interurban roads, and interurban roads are not to any extent at all, so far as I know, built of anything but straight concrete pavement, where the rigid type is concerned. We find a few short sections of concrete bases with brick tops in some states. We find a few short sections of concrete bases, with bituminous top in some states, but by and large the rigid pavement as concerning interurban traffic is the concrete pavement.

H. R. Wilson, a witness in behalf of the intervener, Interstate Commerce Commission, testified:

Direct examination.

By Mr. Ross:

My name is H. R. Wilson, my residence Mt. Ranier, Md., a suburb of Washington. I am Chief Accountant of the Bureau of Public Roads.

(Referring to collection of sheets handed him.)

This is a certificate of the apportionment of funds for the improvement of roads on the Federal Aid Highways of the various states. They show altogether the amounts of money

that have been apportioned, year by year, to all the states in the Union under the Federal Aid, or other highway assistance. I summarized the figures shown on that sheet and they approximate two billion, seven hundred million dollars. Payments have been made to all the states, the District of Columbia, and Territory of Hawaii from appropriations available to the Bureau of Public Roads, from the fiscal year 1918 to October 31, 1936, in the amount of $2,197,634,970.13. There is about one-half billion dollars apportioned which has not been paid out. That covers roads now under construction, for which payments have not been made.

[fol. 181] Q. Have you made any tabulation taken from that information as to the payments made to the State of South Carolina under those acts?

A. Yes, sir.

Mr. Lyles: May it please the Court, we don't desire to disturb the equanimity of the testimony, but it does seem to us there should be some limit to this perfectly irrelevant testimony.

Judge Parker: If it is irrelevant it won't hurt you, and if it is relevant, the Supreme Court will have the benefit of it.

We have paid to the State of South Carolina from appropriations available to the Bureau of Public Roads $29,741,137.63. I cannot state the exact amount of money which has been apportioned to the State of South Carolina which has not yet been paid. It is approximately $10,000,000.00 more which has been authorized, or has been apportioned but not yet paid, and is waiting payment upon completion of the work. We have a statement of the mileage of highways and grade crossings projects in South Carolina improved with funds available from the Bureau of Public Roads as of October 31, 1936, which totals 2,797.8 miles. The statement shows the different type of roads. There are no duplications or overlapping in these figures. There is no duplication of pavement and no duplication of mileage either, because if the road was once improved under a certain type of construction and later had a higher type of construction on it, that mileage is accounted only once.

(Note—Plaintiffs' Exhibits 1-6 inclusive were introduced in evidence in connection with the testimony of this witness.)

[fol. 182] EMORY A. BOUDREAU, a witness in behalf of intervener, Interstate Commerce Commission, having been duly sworn, testified:

Direct examination.

By Mr. Ross:

My name is Emory A. Boudreau; my residence 5555 Thirty-Second St., N. W., Washington, D. C. I am employed with the Bureau of Motor Carriers, Interstate Commerce Commission, as Assistant Chief of the Section of Traffic, which position I have held since the Bureau was organized, a little over one year. My duties are those of General Assistant to the Chief of the Section of Traffic and administrative head of the tariffs. I assist in formulating rules and regulations covering the construction and filing and posting of carriers' tariffs and schedules; conduct hearings with carriers and shippers, and am a member of the Suspension Board of Carriers Classification Committee. I have had approximately seventeen years' experience in the transportation field, in the so-called trolley, freight or electric railroad; in the rail, water, steamship and motor carrier. Seven of the seventeen years were in construction of common carriers' rates and tariffs; five were with the motor carriers; the last two years of my employment in the field was with a cooperative motor trucks rate bureau in New England, representing some 800 motor carriers.

During my experience with the motor carrier industry, the common carrier regular route operators established their rates in cents per hundred pounds, and the common carrier irregular route operators established their rates by the trip. The advent of regulation has changed that practice, only with common carriers irregular route operators, who for simplicity of tariff publication, publish their rates [fol. 183] at so much per mile. That has not changed the basis for rate making, which is, in my opinion, the cost of operation per mile. It has not been my observation that the motor carriers with which I have been familiar apply a different cost for their different size vehicles; for lack of detailed costs and accounting system, an average cost per mile is applied on the vehicles regardless of their size. I would consider the size and gross weight of the motor vehicle would be determining factors in establishing rates, first because the pay-load is in relation to the gross weight

and, of course, covered by the net weight of the vehicle; and, second that the size of the vehicle controls the size of the body, and necessarily the cubicle displacement available for the loading of the merchandise. As to how the gross weight of a vehicle effects the rate, we will say the gross weight of the vehicle is 40,000 pounds restricted (and it is possible to purchase equipment today weighing net empty 16,000 pounds)—we will say that will permit 24,000 pounds pay-load. On the other hand if the gross weight restricted 20,000 pounds, and the equipment of itself weighing approximately 10,000 pounds, it will permit usually loaded approximately 10,000 pounds pay-load.

As to how this would effect the rate in cents per hundred pounds, I would have to use figures of comparison. While I haven't any figures available on the 20,000 pounds carrying capacity unit, I do have figures indicating 16,000 carrying capacity units that indicate approximately a cost of 23.81 per mile, and on a 24,000 pound carrying capacity unit an operating cost of 28.95 per mile.

[fol. 184] There is a difference of about 5¢ per mile cost in operating a vehicle that will carry 16,000 pounds pay load, as against one that will carry 24,000 pounds. These figures are the average for some five hundred operators and represent thousands of miles of observation, and I might say reflect a ten per cent profit in that cost. However, that might be different in this section here due to different conditions; that might be subject to some modifications.

I can give an illustration of such variation: Say a vehicle permitting 24,000 pounds pay-load, and operating one hundred miles, say at a rate of thirty cents per mile. There we would require $30.00 for the trip, and translated into cents per hundred pounds we would require a rate of 12½ cents per hundred pounds, while if the same vehicle cost thirty-three cents, or a differential of three cents per mile, we would require a revenue of $33.00, or in cents per hundred pounds, 13.9 cents.

Q. Now you indicated the difference of one and one-half cents per one hundred pounds for 100 miles and three cents a mile differential. A while ago you were showing a five cents differential. Would that mean approximately a three cents per hundred pounds per mile?

A. No, I had the comparison on the vehicles of same carrying capacity, whereas the five cents differential is between a vehicle of 16,000 pounds carrying capacity, as against 24,000 pounds carrying capacity.

Q. If a vehicle is 20,000 pounds gross weight, it would restrict your load to say 10,000 pounds, and the cost as you have stated is approximately 24 cents a mile to operate [fol. 185] this vehicle, how would the rate in cents per hundred pounds compare with the vehicle of say 40,000 pounds gross weight that restricts the pay-load to, I believe you said, 24,000 pounds, and which you said cost approximately 29 cents per mile to operate?

A. I can best answer that question by giving an illustration. Now the shortest distance over paved road from Asheville, North Carolina to Athens, Georgia, is by Greenville, South Carolina, for a distance of approximately 163 miles. A common carrier restricted to 40,000 pounds gross weight could handle canned goods, we will say, from and to these points at the rate of 19.07 per hundred pounds. If he was restricted to a 20,000 pound gross weight, because of its travel through the northwest corner of the State of South Carolina, he would require a rate of 38.08 per one hundred pounds.

Q. Let's take a carrier operating not through the state but into the state from a point like Richmond to Cheraw, or as compared with one operating to Wadesboro, North Carolina, outside of the State of South Carolina.

A. The distance from Richmond, Virginia, to Wadesboro, North Carolina, is approximately 290 miles. Between Richmond, Virginia, and Cheraw, South Carolina the distance is approximately 292 miles. Now while the carrier operates between Richmond, Virginia, and Wadesboro and restricted to 40,000 pounds gross weight would require a rate of 35 cents per one hundred pounds, on the same commodity between Richmond and Cheraw, because of the 20,000 pounds gross weight restriction, he would require a rate of 67.07 or a difference of 32.02 per one hun- [fol. 186] dred pounds for approximately two miles further to a South Carolina point.

Q. Are these actual rates you are quoting?

A. These rates are rates based on cost of operation, plus a reasonable profit, whereas the rates I understand filed through this territory, here were filed and are related to rail rates.

Q. But you are speaking of rates based on actual cost of operation?

A. That's right.

Q. With this same principle you have indicated as to the difference in rates that is necessary because of possible weight restrictions. Would that hold good as well in interstate operations from the north to the south and passing through South Carolina and going beyond?

A. The principle, the increased rate would be the same on traffic passing through South Carolina, although the rate might be lowered by the carrier if he established transfer arrangements at state line points, say like Rockingham, North Carolina, or Augusta, Georgia. Now the distance from Raleigh, North Carolina, and Macon, Georgia, is approximately 418 miles and if a carrier was restricted in his operation to 20,000 pounds gross weight, and he operated such equipment from terminal to terminal, he would require a rate of 99½ cents per one hundred pounds, whereas if he can operate 40,000 pounds from terminal to terminal the rate would be 50½ cents per one hundred pounds, or a difference of forty-nine cents.

Q. You have indicated there might be some different situation if he unloaded at the border and changed to a different type truck?

[fol. 187] Judge Parker: Don't you think you have pursued that far enough? What you wanted to show was this law placed a burden upon the carrier.

Mr. Ross: Yes, sir.

Judge Parker: You have shown that fully. It would result in an increase in rate. I don't think it makes much difference whether it is five cents or ten cents.

Mr. Ross: If your Honor please, there is one little matter I would like to clear up. He indicated unloading it at the border might change the situation.

Judge Parker: All right.

The Witness: With reference to unloading at the border, if a carrier established transfer points at Rockingham, North Carolina, and Augusta, Georgia, where he could transfer his loads from a 40,000 pound gross weight vehicle to a 20,000 pound gross weight vehicle, in order to cross the state of South Carolina, he would still require an increase of 20.9 cents, or 21 cents per one hundred pounds over the rate required if he is permitted to operate the

larger vehicle from terminal to terminal. In other words, he would require 72 cents for such transfer arrangement, as against 50½ cents if permitted to operate his 40,000 pound vehicle through.

Q. Then it is your opinion that the size of the vehicle is a determining factor in making a rate?

A. Very much so. Of course in these transfer examples I have cited I have not taken into consideration the cost of transfer, the possible cost of equipment or terminals that might have to be purchased at the transfer points.

[fol. 188] Cross-examination.

By Mr. Griffith:

I have a pretty broad general idea of the operations of motor carriers in all sections of the country. There are motor truck operators operating in the State of Texas, in the State of Kentucky, in the State of Tennessee; but I can't name one off-hand that would have to drive or traverse one of these states.

(In answer to question by Judge Glenn:)

The law in Texas is the same as it has been for some time as to weight limits, 14,000 pounds, so far as I know.

Judge Glenn: Are there any truck companies operating to any considerable extent in Texas and keeping going?

A. Well, so far as I know, I have heard of one operator who brought some court proceedings because he could not keep going, or he claimed that he stopped his operations because of the gross weight limitations.

A. B. Mahon, a witness for the plaintiffs, having been first duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

I live in Greenville, S. C. I am connected with Dunheen Mills located in Greenville, and Watts Mills located in Laurens, S. C., as Secretary and Assistant Manager. The volume of our sales is not less than $10,000,000.00, and not

less than 80% of our products is shipped by truck. The Poole Transportation Company and The Transportation, Inc., are the companies which haul our products, to Northern and Eastern points principally, New York City and vicinity. I am familiar with the South Carolina law limiting weights of trucks to 20,000 pounds. If that law is enforced, it will have an effect on the business of my com-
[fol. 189] panies. If other mills in other states making similar products are not subject to the same restrictions it will place us at a disadvantage in competition with them, because it would cost more to get our goods to the principal markets and delay them in transit. That means that it would cut down the flow of our products in interstate commerce. We would also lose our markets to some extent, and it would increase the cost of our products to the public. We ship, from the two mills, probably 50,000,000 pounds annually by truck to New York on short orders for quick delivery. There has been a remarkable change in the handling of textiles in the last few years, so far as time for delivery is concerned. I don't think the big cloth merchants in the centers keep stocks on hand as they formerly did. The companies serving us use large trucks only, carrying a pay-load of around 15,000 or 20,000 pounds; that does not include the weight of the truck. We are paying a rate of $1.15 per 100 pounds by truck on unfinished rayon, piece goods. The average weight of the cases that we ship in is 450 to 500 pounds each.

The development of motor transportation has effected the business of our mills. It has placed us in a better position to compete with other mills making similar products located in other states; most of such mills are located in North Carolina, Pennsylvania and the New England States. I think it would curtail our business if we were deprived of truck transportation. If trucks were compelled to load in two trucks instead of one, it would cause immediate delay in transit and probably increase the cost. I think it would have an effect on the number of our employees. We employ about 3700 now at these two mills, and if this law were
[fol. 190] enforced, I think the number of employees would be redueed.

The time consumed in transportation is a very important element in our business, because the buyers in New York who buy our goods, demand quick deliveries and place their orders where they can get the quickest deliveries. We can-

not get delivery over the railroad within the time our customers require, because they are accustomed to truck deliveries and expect quick deliveries.

I think that truck transportation has tended to reduce railroad rates. The rail rate to New York on the same product for which the truck is charging $1.15 per hundred is now $1.00 plus 8¢ emergency charge. The truck rate is higher than the railroad rate. I continue to ship by truck because it is faster and my purchasers demand it, and we get our money quicker. I consider motor transportation absolutely esential to our business. If mills making similar products in other states have motor transportation and are not subject to the same restrictions, it is imperative that we also have motor transportation for our goods.

I can only say that I think the railroad rate on rayon fabrics was $1.63 before the truck rate went into effect.

Our largest competitor in this southeastern section is the Burlington Mills, located in North Carolina and Virginia,—perhaps other mills in North Carolina,—but the Burlington is the largest group. We could not compete with that group successfully if truck transportation were eliminated. I believe that the advent of truck transportation had the effect of reducing the railroad rate of which I have just spoken.

What I have just said as to shipments leaving our mills applies also to shipments coming into our mills. The same [fol. 191] answers I have given apply to the Judson and other mills operating in this state on similar products. I have been delegated to speak for the Judson Mills today. Mr. Walter Grier, who is the official of the Judson, was expecting to be here but had to go to New York and asked me, if called upon, to speak for the Judson Mills.

JOHN L. WILKERSON, a witness for the plaintiffs, having been first duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

I live in Charlotte, N. C., and am engaged in the transfer and storage business, have been so engaged all of my life,—about 40 years. I am a member of the City Council of the city of Charlotte. I am what is known as an irregular

carrier, one who holds himself out at all times ready to go any place on call. We specialize in moving all household goods. In other words, we will come to your house in Chester this morning and pick it up as you leave it from breakfast and deliver it in New York City the next afternoon if you wish while you are making the trip in your car or by train.

I am president of the Allied Van Lines, made up of various operators all over the United States, consisting of about 500 members, agents of the Allied; President of the Household Carriers Bureau, which we have got together all or the majority at least of operators who handle household goods such as I do throughout the whole country and they have one bureau and one tariff. I use five trucks for my long distance moving of my own individual company in Charlotte. We have in the Bureau, of course, which represents about 2,000 participants, and naturally we have some 6,000 or 8,000 trucks that are covered by these participants in the Bureau.

[fol. 192] These trucks are specially constructed. In hauling household goods, you realize that is bulky and takes lots of space. We base our rate on the cubic foot, for example. The ordinary rooms in a home usually have about 200 cubic feet, or about 1,000 cubic feet to a 5-room bungalow. A 7-room house, of course, would run about 1,400 cubic feet. Well, to have a van handle any class household goods, you want it to be built rigid, you want it absolutely tight to prevent any dust or moisture whatsoever to get into it because it is carried out as it is taken up out of the house with proper pads. In handling it you have to have width and you will have weight in your equipment as well. The most of us use sleeper cab, which is made by the manufacturer, and really puts more weight on the vehicle by having the sleeper cab equipment. Altogether it would weigh over 20,000 pounds. As to the weight of these vehicles, speaking of most equipment, a van that will hold 1,000 cubic feet or move five rooms of furniture, weighs about 13,000 to 14,000 pounds. A 7-room van which we have weighs 19,300 pounds empty. The furniture weighs around seven pounds to the cubic foot, which makes 1,000 cubic feet of furniture weighing around 7,000 pounds, unless you have some extra books for lawyers, doctors, piano or

refrigerator coming in once in awhile. Altogether it would weigh over 20,000 pounds.

If the South Carolina law were enforced, I could use two pieces of equipment in South Carolina but for the fact that it is too wide,—we use mostly 96" equipment all over the country because that gives us the width of a room.

The railroads don't attempt to compete with me. I move most of the railroad people when they move from town to [fol. 193] town because they agree that I can do it very much more satisfactorily than they can. And I might say that I have a letter from Mr. Tilford of Atlanta, and you all know him, and he has no objection to our operation of household furniture moving. All we want is enough room to put a pay-load in there. We specialize in moving families of employees of large industries over the country, when they are moved from the main to a branch office or out in the country. We attempt to move a family with one haul. In other words, a family gets in a car and when they leave the furniture is put in the van as it is, and when they arrive the furniture is in the house. The average American home is a 5-room house. We can take that in one of our trucks,—for example, I am today loading in Boston coming down to Aiken, S. C.

I had the pleasure of moving my good friend, Mr. Jerry Wassum, from Charlotte to Columbia. He was Vice President of the Southern Railroad, now deceased. I could bring that down to Columbia for him, if I recall, for around $65.00 in the van, pick it up in his home and deliver it in his home here. Well, to prepare that for shipment in a baggage car, of course, which he could get, it would cost him around $85.00 to $100.00 to get that work done besides the hauling out at this end, and then he would be without his furniture some four or five days because it would take at least three days to crate the furniture, to prepare it for shipment, and naturally it has to come down to Columbia, perhaps overnight; but in a like shipment, I had a shipment that came locally from up in Massachusetts recently. It took ten days to come down, and yet we delivered it in Charlotte from up there in three days without pushing. We haul at a lower [fol 194] rate, which saves the public money.

This custom of the big industries moving their employees by big vans, when they have to transfer them from point to point, has grown in recent years. It has followed in the

wake of good roads and the development of automobiles. There are quite a number of people specializing, as we do in this country. I imagine, perhaps, as many as 1,000 throughout the country. That is the Association of which I am president.

As to the 90" width in the South Carolina law in connection with my business, 85% of the participants in our Bureau use a 96" width truck. It would mean, I guess that we would have to have a terminal about Charlotte and transfer there and bring down here various loads on smaller vehicles. The transfer of household goods is quite a hazard to household goods as you pick it up as you leave the home. For instance, lamp shades and pieces of that kind. It is a hazard to transfer them from one truck to another. Of course, it could be done. My business has developed from the development of good roads.

Cross-examination.

By Mr. Griffith:

The load that I carry only affects me as to whether I make money or not. It just increases the cost,—it increases the cost. We send two men on the van, and if we had to split the load, that would be four men. In all of our operations, we have to reduce the cost in every possible way. I pay my overload drivers from $23.00 to $25.00 per week, with an 8-hour day work, plus their expense while out on the road. I am not familiar with the railroad rates as to wages paid labor. If my wages were considerably higher that would also affect my business.

[fol. 195] The Allied Lines operate over the entire United States. I am making money.

Redirect examination.

By Mr. Funkhouser:

These big trucks cannot go into Tennessee, Texas and Alabama, but we have agents in those various states that, of course, have to have equipment suitable for those states. I suppose they keep it within the law of the state. They have to, I suppose. I am not able to say definitely, but I know they keep it within the law of the state. The law is not being rigidly enforced in those states.

Cross-examination.

By Mr. Griffith:

I did not say that we could go into a state in violation of its laws. There are a number of Allied Vans going into various states that carry more loads than they are allowed and are not bothered at all. They are no wider, because I don't believe there is a state that has width under 96". The Allied Vans do not make money any way they can. As to paying attention to State laws, it depends on just about like how the railroads operate in various states. That is how rigidly it is enforced.

W. R. Thompson, a witness for the plaintiffs, having been first duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

I live at Greenville, and am president of the Southern Handkerchief Manufacturing Company. I have been in the handkerchief manufacturing business about seven years. I was in the cotton mill business before that time, Treasurer of the Lancaster Cotton Mills, located in Lancaster, S. C. The handkerchief industry is comparatively a young industry in the South,—for about ten or twelve years. My [fol. 196] company was organized in 1929. It has developed keen competition. As to our main competitors, the handkerchief industry centers around New Jersey, with some rather important producers in Chicago. One of the main factors in this competi-on that I have been troubled with is the question of getting our products to the main markets at competitive prices. In the earlier years of the development of my business, my competitors had much advantage over my company in transportation. We had trouble in getting to the eastern markets. We had a freight rate to New York of $1.68, which put us at a very definite disadvantage compared to the eastern manufacturers. The rate to Chicago was $1.97; and the Texas points were particularly difficult to get into. We had difficulty in getting the proper freight rates from the railroads for our products, and it retarded our business; we made honest efforts to get our competitive

rates reduced by the railroads. The trucking companies have reduced their rates to New York from $1.68 to $1.00; Chicago, $1.25 from $1.97; St. Louis $1.25 from $1.95, I believe along that line. These reductions very definitely enabled us to meet our competitors in other states, and to some extent these trucking rates caused the railroads to reduce their rates. If the trucking companies were banished from the highways, or put in a position where they could not operate, it would have the effect of restoring railroad rates, it would hamper us. The railroads now have truck competitive rates to a number of points, but they have not yet met the truck competition to all points. It would increase the cost of our product to our customers. We feel that the reduced rates of the truck companies have very definitely [fol. 197] contributed to our expansion. If this truck transportation were taken away from us, I think we would stay in business, but I think we would probably be seriously hampered and have a greater difficulty in finding our markets.

We do not have an arrangement with a particular trucking company to carry our goods. We just ship whatever we have from day to day. Since the trucking companies came in interstate commerce, the tariff applying to all companies, we use a number of them and we still use the railroad and express companies as well.

The advantage accruing to our company, as the result of our opportunity to ship to Norfolk and South Carolina by truck, lies very largely in getting our goods to the Pacific ports and to the Texas points. We have great difficulty in gaining any immediate competition over Passaic, New Jersey, due to its close proximity to New York and the Pacific Coast. We have to pay a higher freight rate to Charleston. It was $1.10 as I recall, it is now 55¢. We have another advantage in shipping to those points by truck over railroads due to the fact that we can definitely get our goods to those ports in time for scheduled sailings for steamers. We could not be certain of that by railroad. The element of time is very definitely an important factor in our business. Our customers frequently call for quick deliveries; that is a new development in recent years as a result of trucks; in our judgment it is here to stay.

I could not say whether it would increase the cost of our product to our customers if the trucking company hauling our products were required to use smaller vehicles; I would

say that if they had to increase their rates to us, it would increase the cost of our products to our customers and put [fol. 198] us to a decided disadvantage. If our competitors in North Carolina or other states shipped by truck, and we were prevented from shipping by truck, that would cut us right off as to our markets.

D. C. Mason, a witness for the plaintiffs, having been first duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

Mr. Funkhouser: I would like to state to the Court what the purpose of this testimony will be. This is a gentleman sent here by the Town Council of his town, which is the town of Summerton, where they had a railroad and it has been abandoned and the tracks taken up and that the community is dependent upon truck transportation. I understand there is a community of 35,000 people.

The Witness: The county has 35,000 people in it and this directly affects 75% of them.

Mr. Funkhouser: I am putting on as a typical South Carolina community that will be without sufficient adequate service and I will connect this up with the others. I understand there are 980 other such communities as a result of the abandonment of the railroad.

Judge Glenn: This Court takes judicial notice that that railroad has been abandoned. It operated at a loss and went into receivership.

The Witness: The Northwestern Railroad of South Carolina formerly served my town, Summerton, Clarendon County. There are about 1200 people in the town, and 32,000 in the County. Our half of the County which was served by this railroad contained about 75% of that population. There were two railroads abandoned in the County, the Northwestern of South Carolina and the Alcolu Railroad out from Alcolu. The Northwestern ceased to operate August 13, [fol. 199] 1935. This community now depends entirely on trucks for transportation. Harvin Gray Lines is the trucking concern that gives that service, operating four trucks. Cotton is about the only thing produced in interstate commerce. Corn is moved to North Carolina. Cotton is one of

the larger products of the community. Prior to the truck, the cotton rate by rail to Charleston at one time figured about $2.40 a bale, that was several years ago; and has been gradually reduced so that when the railroad left there it was 70¢ a bale. The rate to Charleston now by truck is 50¢ a bale.

Judge Parker: I don't see that that affects Interstate Commerce hauling it to Charleston.

A. The same rate applies to any place in North Carolina proportionately.

Judge Parker: This regulation is perfectly valid so far as Intrastate commerce is concerned in South Carolina. Let's confine ourselves——

Judge Glenn: How many bales of cotton are sold annually on the Summerton market?

A. Around 5,000 at Summerton probably. 75% of that cotton was sent to North Carolina Mills this year, different mills around Charlotte and other places. The customary truck load this fall on shipments of cotton to the mills at Gastonia is 33 bales. That is 16,000 pounds gross. If the 20,000 pounds law were enforced it would cut the load to 22 bales and increase the cost 5¢ a bale to Charleston.

Judge Parker: What do you think about a 33-bale load? Do you think it is a hazard on the highway?

A. I don't see any difference in a 33-bale load of cotton than in any other moving van so far as size is concerned. There is a movement of corn out of that community to North [fol. 200] Carolina which is hauled by trucks in racks, and they move approximately 8 tons. The production of corn in our community has grown up since the trucking industry. That is something that never had been known—to sell corn to a mill in North Carolina.

The old railroad depot has been torn down and a filling station put there. Fertilizer is hauled in interstate commerce into our section from Savannah, Ga. It is important that fertilizer be hauled in by loads of over 10,000 pounds, so that the gross loads will be over 20,000 pounds. At the present rate we can get a 9-ton truck of fertilizer from Georgia to Summerton for $2.40 a ton. If you cut that down to five tons, it increases the cost per ton $2.00. The truck delivers that fertilizer right to the farmer's field. This is

a benefit rather than storing the fertilizer in a warehouse, as it saves the farmer the labor cost of coming for the fertilizer himself. If takes about five hours to bring fertilizer over the Southern Railway to our community. If a farmer orders it late one afternoon by truck, it is delivered the next morning and he goes to work. The railroads cannot offer that service at all now because we have no railroad.

PAUL SANDERS, a witness for the plaintiffs, having been first duly sworn, testified:

Direct examination.

By Mr. Beall:

I live at Ritter, am engaged in farming and have been so engaged all my life, produce principally what is known as "perishables"—vegetables, all of which is shipped in interstate commerce. As to the relationship between my business and truck transportation, I will make this statement. Prior to the advent of the movement of our products by truck, we had reached the point where we had concluded to quit, could not go on. We could not get the one thing [fol. 201] we have always cherished and tried to get—distribution. No way to get it and no way today except by movement of trucks. As long as we get distribution——

Judge Glenn: You mean delivery to live markets?

A. Yes. If we load a truck load of radishes and load about 400 packages very frequently the Washington market will not absorb more than 100 packages. They leave 100 packages there, go on to Baltimore, leave 100 there, then leave 100 at Philadelphia, and New York 100. We do that practically every day. We get that kind of distribution, and we reach small towns in that way that will not take a whole car load and reach towns that will handle a truck load where it could not handle a car load. Then we get this big advantage; we take a truck and go to the farmers, say, A., B., and C., our neighbors, six or eight miles from a railroad, and that same refrigerator truck goes in and serves those three or four or five farmers, loads one truck, thereby giving small farmers who heretofore could not get to the market—so that has been quite an advantage.

Now we are making joint shipments. We feel if you take the truck service away from us, and if we expect to remain in business we have either to go to North Carolina or some point north where we can continue in our vegetable production. We cannot meet competition without truck service.

If the South Carolina 20,000 pounds gross weight law is enforced, it would put us out entirely as to refrigerator trucks, because we cannot get a truck to go from our place to New York with a pay-load of less than 10,000 pounds. They cannot afford to take it. A truck could not get over 5,000 to 6,000 pounds pay load and comply with the South Carolina law. If we had no trucks, we could not ship by railroads, because we cannot get the distribution.

[fol. 202] Q. Tell the Court some of the factors that have existed in connection with the cost of getting stuff from the farm to the railroad and leaving it at the other end.

Judge Parker: Is this not cumulative of what Mr. Geraty said?

Mr. Coleman: Yes.

By Mr. Coleman:

Q. You heard the testimony of Mr. Geraty?
A. Yes.
Q. Do you adopt Mr. Geraty's testimony as to this?
A. Yes.

[fol. 203] J. K. MAYFIELD, a witness for the plaintiffs, having been first duly sworn, testified:

Direct examination.

By Mr. Coleman:

I am a truck farmer, living about fifty miles from Columbia at Denmark, S. C. I specialize in watermelons and canteloupes. As to how melon growing is affected by truck transportation and refrigerated trucks, to begin with, we practically went out of the truck growing business at Denmark because of the highness of the rates and slowness of the railroads. We can load 800 melons at our farm to Philadelphia. It would leave the farm at six in the afternoon and be there at midnight. The Federal Inspector would check these melons for crating and weight. Those

800 melons would weigh, say, an average of 25 or 30 pounds —a 20,000 pound pay-load. The smaller trucks simply cannot make the haul with this limited tonnage. I cannot tell you why, but we don't get quick service from the railroad. Quick service is important, because our products ripen quickly and suddenly, more particularly so with canteloupes. We have had extremely hot days, maybe Saturday we have loaded a truck load and then Sunday when it turns hot maybe 50% ripen just about in a few minutes. Then these would have to go out in a refrigerated truck to the market. Another thing, the market in the north wants fruit ripened on the vines now, because vine-ripened canteloupes we have been able to sell much better, particularly in Washington, Philadelphia and Baltimore. We can load them at our shed on the farm at six o'clock in the evening and they will be at the commission man's office at twelve o'clock. We load them Saturday afternoon at six o'clock and they will be at the commission man's for Monday morning's market. That is a new service possible through trucks, and we need the heavier weights to take care of the retail stuff that calls for refrigeration. You simply cannot ship watermelons on the small trucks. They are heavier and it is impossible for a man to get a pay load. The pay [fol. 204] load would be 20,000 pounds. These refrigerated trucks carry about 300 crates of canteloupes, then they have to have ice and the weight of the equipment on top of that, the pay load would be from eighteen to twenty thousand pounds. This is more so as to watermelons, because of their bulk.

C. B. Carley, a witness for the plaintiffs, having been first duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

I live at Yonge's Island, South Carolina. I have been with the Fruehoff Trailer Company, the world's oldest and largest manufacturer of trailers in Detroit, Michigan, and we think the world's best. I am one of their agents in South Carolina.

Q. That company is probably the largest manufacturer of trailers in the United States?

A. By far. I would like to explain one thing, that for fourteen years this month I have been connected directly with the sale and use of heavy vehicles. For a short period of time I tried to operate some trucks that came within the limit of South Carolina's 20,000 pounds, and I found out to my sorrow that it could not be done. I was in Tennessee when the other half of the new Mason-Dixon Line was constructed. I was employed there and had to leave; was transferred to Baltimore. I have sold the heaviest and most expensive and know the light, cheap truck. I would be glad to have you ask me questions. I am not a specialist, but have had a good deal of experience.

The standard size of the body of trucks used in interstate commerce generally is 96 inches. I would say from 85 to 90% of all trucks used in interstate commerce are 96 inches in width. With reference to the standard as to weight, the standard pay load is approximately ten tons and loaded in every state in the Union in safe vehicles with proper brakes and tires, except five. The width of 96 [fol. 205] inches, or greater, is allowed in every State except South Carolina. Florida and North Carolina recently changed to conform.

Judge Parker: Which five do not load ten tons pay load?

A. South Carolina, Tennessee, Kentucky, Alabama and Texas. They are all related to the Mason-Dixon Line.

Q. How about Mississippi and Alabama?

A. I included Alabama. Mississippi is low in which ten tons could be handled, I believe. They have an axle limitation.

As to my opinion as to what is the smallest truck that will safely carry a standard pay load, there are various opinions about that. I want to tell you in South Carolina today that there are a great many trucks that are bought to try to conform with this law and yet are being overloaded and unsafe. I want to point out that the gross weight of 20,000 pounds does not relate to safety at all—quite the contrary. A light weight bridge is not safe; neither is a light railroad car. A box car must be heavy to keep it from folding up, bending and sagging under a load. The same thing applies to trucks—four or five hundred pounds' difference in the weight with a proper set of brakes, and improper brakes in a trailer—those things all

enter in. The rates of men hauling in interstate commerce are based on the ten ton pay load.

(In Response to Questions from Judge Glenn): If one of the companies doing a big business, and having capital, would give my company an order for ten trucks conforming to the South Carolina law, we could manufacture them and sell them at a reasonable profit, depending on the cost of manufacture, but they would be manufactured to meet special conditions and at a naturally higher cost to us.

Judge Glenn: Would not after six months' or a year's time—take care of South Carolina business, and would they [fol. 206] not be able to consolidate it to haul it in these small trucks even at a slightly increased cost?

A. My opinion goes right along with the other gentlemen as to the increase in cost—about fifty to sixty per cent.

Judge Glenn: Even if the trucks were bought in considerable number instead of the spasmodic buying of one or two trucks?

A. Yes.

Judge Glenn: I am talking about cost of trucks. Suppose Mr. Barnwell's company would give you an order for ten trucks that would conform to South Carolina's law, at one time. Couldn't you make him a much better figure than he was talking about this morning?

A. Yes, sir; but on the other hand, the regulations applied in these few states, South Carolina, Alabama and so on, restrict the use of trucks in those states to a certain degree and therefore our market in those states is restricted still greater.

Judge Glenn: But you sell a lot of trucks like those to private individuals who do intrastate business almost entirely?

A. In South Carolina?

Judge Glenn: Everywhere, all over the country?

A. No, sir; our average trailer sale is 20 feet long—that is our average truck and rather large trailer.

Our smallest trailer is capable of carrying 7½ tons pay load; from that up to one hundred tons pay load, the largest we have. The one capable of carrying one hundred tons pay load was built for handling electric equipment—they got special permits for hauling them.

If this law were enforced, as to the effect on shipments

of tobacco from South Carolina—the principal tobacco market in North and South Carolina is Winston-Salem, [fol. 207] and that area, and it is approximately the same distance from Mullins, South Carolina, to Winston-Salem as from Washington, North Carolina, to Winston-Salem, and the farmer in the North Carolina area would have the advantage of the much cheaper transportation cost to Winston-Salem than his competitor in South Carolina. There would be a discrimination against the South Carolina shipment.

The modern refrigerator truck built by our company cannot be used in South Carolina, generally speaking. I have a photograph here and a certified copy of one of the vehicles that has been talked about here, which I sold for use in South Carolina, and it has been used in South Carolina. It is a modern refrigerated truck. It weighs 13,600 pounds. When it is loaded it would weigh 33,600 pounds, with a ten ton pay load. That would be legal in every state on the Atlantic seaboard except South Carolina. I would like to point out that North Carolina, Virginia, District of Columbia, Maryland, Delaware and all these other states tell these South Carolina farmers they can haul that ten ton pay load of vegetables, over their highways—"Yes, Mr. South Carolina Farmer, you can do that; put enough brakes, tires and lights and so forth on your vehicle to have it strong and safe * * *." The markets in the North require that kind of a load of refrigerated products in order to compete. The practical effect of the enforcement of the South Carolina law would not be to exclude tractors-semi-trailers entirely. The tractor semi-trailer can carry a little larger pay load under South Carolina law, because there is one thing in the law we haven't understood before, and that is this 10,000 pound axle limitation, which would make an actual gross weight of a four-wheel truck of only about 15,000 pounds, because you would only get about one-third on your axle.

Mr. Coleman: That is all.

The Witness: Could I have about two more minutes to explain something that is difficult to bring out in a question? [fol. 208] Judge Parker: All right.

The Witness: You are interested in the reasonableness or unreasonableness of the South Carolina law, and whether it actually does promote safety upon the highways. There

are hundreds of vehicles in South Carolina that will be legal if this 20,000 pound law is enforced, that are very unsafe, that could not go into North Carolina, because South Carolina in its hurry to pass this law overlooked applying brakes on semi-trailers. That is a very important matter. Semi-trailers aren't even required to have brakes in South Carolina, but they are in North Carolina, but this law wasn't enacted to improve safety.

Maryland has weight limitations graduated according to the weight of the vehicle. I have had experience there in that state. Here is a Ford truck that is handled by Cokers Wholesale Company; that vehicle is used almost entirely in interstate commerce. They made a very thorough study and did allow that vehicle approximately 30,000 pounds gross in Maryland and only 20,000 pounds in South Carolina. That vehicle has been inspected in Pennsylvania and has a Pennsylvania inspection certificate in its windshield, showing that it is properly equipped, yet it is going to be taken off the roads by this law, and hundreds of vehicles that couldn't meet that inspection will be left on the road, so is that law reasonable when it does such a thing as that?

J. S. Williamson, a witness for the defendants, after having been first duly sworn, testified:

Direct examination.

By Mr. Griffith:

I am Chief Engineer of the South Carolina State Highway Commission, and have held that position since July [fol. 209] 15th of last year. Mr. Charles H. Moorefield, my predecessor, held the position for about fifteen years. He died in April of this year.

The Witness then identified ("Defendants' Exhibit 7") a map of the State Highway System of South Carolina, on which, in addition to the regular printed matter, there is shown in red ink the roads in the construction of which Federal Aid Funds have been used at one time or another.

The Witness: This does not indicate that the entire cost of such roads was borne by the Federal Government—not more than 50 per cent of the cost came from Federal funds.

There are some few short sections, since the New Deal has been in, as to which we secured Federal money for the entire construction, but the majority of the roads have been built partly with State and partly with Federal funds. That practice has obtained since 1917, I think.

(The map in question was offered and received in evidence and marked "Defendants' Exhibit 7".)

We have approximately 60,000 miles of road in the State of South Carolina, and about 6,100 miles in the State Highway System—that is the latest estimate—so that our Highway System is approximately 10% of the road mileage in the State. The other road mileage is under the supervision of County and City authorities.

Q. Now, do you have different types of roads in your highway system?

A. Yes, we have roads classified as standard paving, bituminous surfacing, earth type and unimproved. That is the general classification that we give the roads.

Q. Can you give me the mileage in each classification?

A. At the end of the last fiscal year, June 30, 1936, our mileage of standard pavement was 2417; bituminous sur- [fol. 210] face, 1724, earth type 1141, and unimproved 666 miles.

Q. Now, in your standard type of concrete paving, does that include variations of concrete paving?

A. That includes what we call plain concrete pavement, that is, the whole surface is concrete. It includes asphalt pavement with concrete base. It includes asphalt pavement on asphalt base.

I think that the gentleman from the Bureau of Roads was about right when he testified that the concrete road is the one road for which there is a formula to determine its strength. There is no definite formula by which to determine the strength of other types of roads; we use our experience in determining the thickness, etc.

Q. Will you tell us the approximate mileage out of the 2,400 which is concrete throughout, and the approximate amount of variations?

A. I don't believe I have that right now, Mr. Griffith. The concrete mileage is probably 75 or 80 per cent of the total.

Q. The concrete is about 75 or 80 per cent of the total?

A. Yes, sir.

Q. So, you would say then that you would have somewhere in the neighborhood of 1,800 to 2,000 miles of concrete paving?

A. Yes, sir.

Q. Now, as to the dependability of the different types, how do they vary?

A. We have some of the oldest pavement in the State which are asphalt pavement on concrete base that are giving satisfactory service.

Q. We have some old concrete pavement that is giving good service?

A. Yes; however, the concrete surface has more tendency to break up than the asphalt pavement. We have more [fol. 211] breaking, that is, a visible breaking. There may be breakings in the base under the asphalt pavement that are not noticeable.

Q. What is your opinion as to the load that these concrete roads may safely bear?

A. That is very indefinite.

Q. Why so?

A. That will depend on a number of different things. The sub-grade conditions is a very big factor entering into it. Some concrete pavement in one section may hold up 100,000 pounds. The same identical pavement, as far as construction goes, may break up under a two or three thousand pound load.

Q. Do those sub-grade conditions occur right along in the same territory of short distances?

A. It occurs very often in short distances of one another on the same road.

Leaving out the concrete roads, and asphalt combined with concrete, our next best type of road is the bituminous surfacing. In recent years we have constructed considerable mileage of that type. So far as weight or stress goes, the ability to withstand weight, that is more or less an earth type road with an all weather wear or surface on the top. It is constructed by building an earth type base of some local material, that is, with proper clay and sand content to make a good tight hard base that water will not soak through, and moisture will not soak through and won't get soft when wet or dust out when dry, then in placing an asphalt wearing surface about three-fourths inches thick. This wearing surface merely gives a roof to the pavement,

though the base is what carries the load. Of course, this is nothing more than an earth type road with a cover over it. That is exactly what it is. The base is usually eight inches thick, but there are variations from that; where we nor-
[fol. 212] mally see that there is a bad sub-grade condition we have increased that up to approximately 12 inches in short sections. Where it is very noticeable that we have a bad condition, that is, gumbo, wet clay, water seeping, we have increased that base thickness. These roads are primarily designed for automobile traffic. They are not well adapted to heavy loads or to steel tires or horse drawn vehicles. Horse drawn vehicles, steel tire vehicles, will injure the surface, cut through the surface. When you break the seal of that surface, you are apt to have failures. We have been constructing those since 1924, and on a large scale only recently. We have gone to that type of construction rather than to the concrete type on account of the financial situation. That type can be constructed at a much cheaper price than the concrete pavement, and due to the lack of funds and the demand from the public generally to get them out of the mud and dust, we have had to take what funds we had and spread it over a large mileage, and that is about the only way we figured we could do it in order to get all weather roads. These bituminous surface roads are about one-third of the mileage in our State Highway System; we have about 1,700 miles of them. We have about as much earth type and unimproved roads as we have surfacing, not quite one-third.

My experience and observation as to how these bituminous roads hold up under heavy traffic is that in the places where we have had unusually heavy traffic, we have had considerable failures. And we have had other failures. Various things can happen—your subgrade condition and that always comes into it, it is always a factor. You get a base, a subgrade, wet and spongy, and particularly in the clay which changes in volume, which causes trouble, and when you have got a subgrade of this type of road, if it gets wet, of course, any heavy load will mash the sur-
[fol. 213] facing down into it more readily than a light weight on it.

Q. Have you had opportunity to compare a road standing light traffic constructed with bituminous surfacing, and afterwards being subjected to heavy motor vehicle traffic?

A. Yes. In 1935 we completed a section of State Road No. 33 between Tillman and Hardeeville of this bituminous type on sand clay base, and in the fall of that year, shortly after it was constructed and opened to traffic, it was necessary to do some repair work on Route 17 between Ridgeland and Hardeeville, and in order to do that repair work we had to detour the traffic from Hardeeville up to Tillman over this new construction, surface treated road, and the traffic on that road immediately caused failures and ruts were developed in the surfacing. The wheels of the trucks would sink down in there and the shoulders were pushed up. As a result of that, we have had to do considerable repair work on that road, and I believe we spent in the last 12 months as unusual repair on that road in the amount of $12,378.00 in order to put the road back into shape. The traffic was only detoured over that section for two or three weeks and since we have got the repair work done we have had practically no trouble on that road since.

Q. You say you detoured heavy traffic over that particular section of bituminous road. The main road that was closed and caused this detour, what kind of traffic has it been subjected to?

A. It carries practically all the load of the traffic that comes into South Carolina out of Savannah, the automobile traffic, and motor truck traffic. All the traffic practically that comes into South Carolina from Savannah goes over that route.

[fol. 214] Q. And you say you had detoured them over this bituminous surfacing for two or three weeks?

A. Just a few weeks. Also we had a section of route 15 which is one of our main routes through the State. We have two sections of that type, the bituminous type, one in Clarendon County from Summerton to the Sumter County line, and the other in Marlboro County from Society Hill to Bennettsville. Those sections of roads were constructed in 1933, and have been open to traffic continuously since. Our regular schedule on roads of this type is to place a re-treatment on them—we have set up a sort of schedule of about every five to six years to take care of the wear and irregularities that might develop in it normally from traffic. Both of these sections of road that I named, it was necessary for us to retreat them both this year, which is only three years. They

were only three years old, so that on account of the heavier traffic on that route, it was necessary to retreat those sections about two or three years earlier than we would normally have done. Other roads that were constructed that same year have not yet been retreated. We have quite a number constructed earlier than that have not been retreated yet.

I cannot say that I definitely know, except in a general way, the roads which bear the most of this heavy truck traffic. All of them are subjected to some. There are trucks on practically every road in the State, it has been my observation. There are some trucks on every road, every station that I come to.

Q. I will ask you this question. Are there not other routes over the State over which there is some of this bituminous surfacing, or other weak type of road?

[fol. 215] A. Right off hand, I think we have some section like that on practically every road in the state. There is either a light bridge or piece of bituminous surfacing or pavement, or surface treatment of some kind on practically every road we have got throughout the State.

Q. Now, just in that connection, Professor Tucker • • •

Judge Parker: I wish to clarify that a little. I know something about South Carolina roads—the road that goes from Columbia and strikes the North Carolina line and goes through Augusta, the road that goes from Florence to Charleston, the road that goes from North Carolina to Greenville, are they weak in spots—are there weak spots on those roads?

A. Route No. 1 going through the State, we have a bituminous surface road from Cheraw to the North Carolina line. We also have a very weak bridge at Cheraw. We have just recently let a contract to build a new bridge at that section. The balance of Route #1 is of what we call standard pavement. We have some concrete paving. We also have some asphalt paving on concrete base. We have some of that type about ten miles north of Camden with asphalt paving and goes through Columbia and stops.

Judge Parker: Isn't that sheet asphalt with concrete foundation?

A. Yes, sir, we class that as standard paving. It isn't all sheet asphalt. Some of it is. This section from Columbia

to the County line, that is asphalt with concrete base and the same thing from Columbia to Batesburg, sheet asphalt, concrete base. The balance of that road is plain concrete paving.

Judge Parker: You spoke of a weak bridge—what do you mean by that?

[fol. 216] A. That is a bridge that is not safe for more than ten tons.

Judge Parker: I am speaking about this particular bridge you are speaking about, at Cheraw.

A. That bridge at Cheraw is unsafe for over five tons, and part of that bridge is an old covered bridge that was built three years ago. It is one of the old relics of the State. That is the only covered bridge in the State highway system now.

Q. What about your road from Wilmington, N. C., to Charleston by Florence?

A. That is, coming in by Dillon and Florence? You cross the Pee Dee River at Mars Bluff and you have a bridge there that is not good for more than two tons. We are rebuilding it now.

Judge Glenn: That is the one we rowed about a few years ago?

A. The Mars Bluff, yes, sir. We are rebuilding the bridge, but the overflow bridge on the Marion side is practically rotted down and we have a contract to rebuild that bridge. It is not safe to motor traffic. The bridge was not designed to carry more than ten tons. At that section they ought not to have built a bridge like that. I would not build it like that, certainly at that location. It is a very poor location. The road from Charlotte down by Gaffney and Spartanburg to Greenville, that is, route 29,—that is standard paving most of the way. We have concrete paving north of Gaffney; between Gaffney and Cowpens at Thickety Creek we have a bridge that is only fifteen feet wide. We have only rails. We are contemplating rebuilding that bridge probably next year, and the strength of that bridge—[fol. 217] that is one of the first bridges built by the State Highway Department and it was designed for a ten ton load.

Judge Parker: You are an engineer. Will it support ten tons?

A. I would not say it would safely support it. It may stretch beyond the limit of stretch and a few loads go over it and then a lighter load will drop through it sometimes, a horse and wagon may drop through it after a heavy load has gone over it. That is one bridge we are contemplating rebuilding. We have under construction now a relocation there out of Greenville between Greenville and Spartanburg. It is so rough you cannot hardly get through there. It is narrow and it is not safe for the traffic. This road is one where we have lots of accidents, fatal accidents. We are relocating that road and building a bridge. The road below Anderson at the Georgia line, there is an old steel bridge built as a toll bridge back in the horse and buggy days, it is still there in use and I just got a letter from the Georgia Highway Engineer this morning, or this week rather, asking that we consider that in our construction for another year. I told him we would be glad to do it as soon as we could get hold of the money to build it. The alignment of that bridge is particularly bad on the Georgia end. You hit a place at the end of the bridge, and the bridge is light steel construction, built by a private individual for the purpose of making money out of it on the toll and he built it as cheap as he could get by with. The bridge isn't safe for certainly over ten tons.

Judge Parker: Are there any arteries of interstate commerce in South Carolina where there are any such places?

A. Yes.

[fol. 218] Judge Parker: Are there any other arteries other than the three routes I have mentioned?

A. Yes, you might consider the road from Augusta up through Greenwood. The Greenville and Henderson and Asheville road. That road generally is a pretty good road. The bridge crosses the Savannah River to Augusta. We have plans under way now to construct that bridge. There again the State of South Carolina has already set up an allotment and Georgia is going to handle that work and we specified we had to get all our contracts through before the money became available. We have the money available now to construct that bridge which is a weak bridge in there.

Judge Parker: Are there any other weak bridges on those routes?

A. I do not recall any other weak bridges. There are some timber bridges in Greenwood County between Greenwood and Ware Shoals that are not safe for over ten tons.

Judge Parker: I had in mind this: that in view of this testimony—I don't know what may be disclosed—it appears here that the wheel load is the criterion with respect to load on pavement and with respect to weights. It seems to me the total weight of the truck is the important factor and the Legislature would have a right to consider that, as well as the strength of the pavement.

A. Yes, that is a very important factor because the bridge, particularly if a trestle, if you have a 200 foot span, that span has got to stand the total load that goes across it regardless of whether there are three axles, two axles or one. The whole load will then be on that span at one time, and we have quite a number of spans more than 200 feet in length [fol. 219] from one pier to the other.

Judge Glenn: Yes, that road that goes over by Rosinville to Sumter is used quite extensively?

A. Yes, I think that road probably carries more interstate traffic than any other continuous road through the State. We have other routes that have heavier traffic immediately adjacent to towns between Spartanburg and Greenville, the traffic generally is heavier there. The road immediately out of Charleston towards Orangeburg, traffic is quite heavy there, and from Aiken to Augusta the traffic there is heavy, but they are mostly short sections, but this route by Rosinville, Sumter and Bennettsville carries pretty heavy traffic all the way through, and we have a number of weak bridges on that as well as weak sections of surface treated roads that I have just described.

By Mr. Griffith:

Q. I was asking you to trace the road that Professor Tucker said he traveled. He said he left Charlotte and went to Spartanburg. Did he encounter any weak bridges and sections of road there?

A. Yes, a weak bridge at Thickety Creek. That is route 29. That is the bridge we contemplate rebuilding next year.

Q. From Spartanburg to Greenville?

A. Spartanburg to Greenville there are several narrow bridges, the ones we have had several accidents on. They are concrete bridges about eighteen feet wide. We have had one rail broken off of them and quite a number of accidents against them. There is a place between Greenville and Taylor, a place we have under construction and relocation to get the traffic off the road. That is very inadequate. That is under construction now and it is very heavy traffic, and as I understand, the road we are building is designed to carry two to twenty trucks traveling behind each other twenty feet apart.

[fol. 220] Q. You found it necessary to accommodate the traffic there?

A. Yes, and we have to contract for grading two grades over the Southern and the P. & N. railroads. We have not let the contract for paving, but that will be let.

Judge Glenn: You are building the bridges now?

A. Yes, sir, we are building that grade over the Southern. We are building the bridge.

Judge Glenn: What about all this talk about a new super highway from Greenville to Spartanburg?

A. That is part of it. We are also contemplating letting some building out of Spartanburg, and I except we will keep on until it meets in the middle. With the funds we now have, we will be able to do it, but we can not go into it all at once. We have to go at it gradually.

By Mr. Griffith:

Q. From Greenville down to Anderson?

A. From Greenville to Anderson there are two roads in there. I don't know which road he followed. If he went by what we call Dunner's bridge, Route 81, that is bituminous surface road practically all the way within a mile of Anderson. The other road by Piedmont, Pelzer, Williston, is concrete pavement. There is no particularly week place on that.

Q. From Anderson to Greenwood?

A. From Anderson to Greenwood, I presume he went by Belton and Honea Path, Donalds and Hodges. In Hodges we have a piece of surface treatment for about a mile, and there are three grade crossings there in Hodges, two over the Southern and one over the P. & N.

Q. Have you a project for a program for building or for probably letting a contract to rebuild it sometime soon?
[fol. 221] A. Our plans for rebuilding that will be for surface treating, that is bituminous surface through that section from Hodges into Greenwood. We have a contract under way now in the City of Greenwood where we have completely torn up the old pavement as it was and replacing that with new concrete paving.

Q. You mean the pavement in Greenwood gave way?

A. Yes, it was practically worn out and hammered out, and when we got there to move it out, we found it was very little trouble to shovel it out.

Q. In practically all of these routes, regardless of where they are, don't they pass through towns and cities?

A. Yes, we have tried in a few places to build by them, and sometimes we have. One of the most noticeable is your city of Newberry. We built a road past that town and it does not necessitate all of the traffic going into the town.

Judge Glenn: And Ridgeway.

A. Yes, built two in Ridgeway, and now building a third one.

By Mr. Griffith:

Q. In passing through those towns, you don't construct the roads through the towns?

A. Generally not, particularly if they are towns of over 2,500.

Q. So in towns of over 2,500 you have no authority under the law to build them?

A. Except under certain restrictions that such law permits. The law permits us to build roads in towns over 2,500, provided the houses average more than 200 feet apart on both sides. So going through a thick settled town, about all we do is to go around. Sometimes we get a few blocks. Of course, under the National Recovery Act [fol. 222] where we got Federal funds, they provided funds for municipalities, and where Federal funds are furnished we have gone into the town and built some povement, like Greenwood.

Judge Glenn: That place in Greenwood?

A. Yes, I say this, under the National Recovery Act where the Federal Government furnished all the money, Federal

money, the Act provided that 25% of the money allocated had to be spent in the town. We have spent some in them. We spent some in Columbia, Greenwood, Spartanburg and Anderson.

By Mr. Griffith:

Q. In using the streets of the cities and towns, how are they constructed, have they been designed for heavy traffic?

A. Mr. Griffith, my experience with the city work is that the pavements are not as well constructed, if I might say so, as the ones that we construct today. The city pavements, the most of them, were constructed years ago. They did not probably know as much about paving as I think we know now, although I think we know very little, but their design—they built thinner pavement, for instance, a good part of the city work a few years ago, standard construction, was four inches concrete base with a 2½ inch asphalt on that surface; whereas now when we construct a road of that type we put a six inch concrete base, which is a 50% thicker concrete base, with a three inch asphalt surface, which gives a nine inch pavement against what they had, 6½ inches, and not even that, probably due to the inspection or otherwise. A good many cities' pavements are not even that thick. Some of this pavement we have torn up where they have had four inches, or an inch or an inch and a half, or two inches.

[fol. 223] Q. They were not designed for anything much more than passenger traffic?

A. I cannot say what they were designed for, but that is what I would think they were designed for. I have had experience in city work. I have done some of it back in 1920, and we had very few heavy loads at that time, and what we wanted was to get the streets paved so the people could ride in their automobiles and get them out of the mud and dust. That was the main thought at that time.

Q. In order to save a little time, I will not ask you to complete the route traveled by Professor Tucker. The conditions which you have named up until now on that route about weak bridges and over bituminous surfacing, that applies generally throughout the State, does it now?

A. Yes, about the average. On some routes we have many more weak places than on others.

Q. Now, you also have stretches of unpaved dirt public roads scattered through your highway system?

A. Yes, sir.

Q. For instance, at your prominent city of Newberry to Chester—aren't they connected by a dirt road?

A. Yes, we have a part of that road—it is quite a long road out of Chester—from Chester to Rock Hill still a dirt road. We entered into a reimbursement agreement, but it has not been done. There are quite a number of weak bridges on that road that we are going to reconstruct.

Q. That is the Calhoun highway?

A. Yes, that is one of the principal highways. That is not the Calhoun highway, no, sir, but that is a section of route 9, which is one of our longest routes in the State. It [fol. 224] goes to Spartanburg and continues through the northern part of the State to Little River on the Coast. That is one of the longest routes we have in the State.

Q. You have other sections in the state scattered through your highway system?

A. Yes, sir.

Q. Would you say that that type of road is designed to carry heavy traffic?

A. Top soil road?

Q. Yes.

A. Oh, no, sir, particularly in wet weather. You put a heavy load, even a three or four ton load on an earth type road in wet weather, it is liable to tear it to pieces.

Q. What about having axles 40 inches apart on that dirt type road?

A. It depends on how much you put on the axle. You can put as much on the axle as on the single truck, the weight on the axle is what does the damage to your road, the wheels. You can have numerous axles, and if all of them are heavily loaded, you will have damage, of course.

Q. As to your dirt type road . . .

Judge Parker: The actual distribution of weight—in other words, if you had four axles on a truck, each axle carries one-fourth of the weight if it is evenly divided, that is true if you have ten tons and four axles.

A. Yes, sir.

Judge Glenn: Let me ask you about this. If the axles are spaced 40 inches apart, if the strain from one wheel will be absorbed, but the other wheel strikes some spot

on the ordinary concrete road, is that true of the other road, the dirt road?

[fol. 225] A. Not so much because you have not beam strength on the dirt road. You may hit a soft spot, there is no beam strength that you can see in an earth type road. That is an entirely different character. A concrete road gives a little beam strength that the load is distributed over. A wet area section, I think that is fatal to the dirt road.

Judge Parker: Mr. Williamson, in your policy—you spoke of the Thickety Creek bridge for example, in your policy of strengthening these weak bridges for construction, have you given any priority to those bridges on the main routes which carry heavy traffic, or have you followed the policy of strengthening the weak bridges in the state roads?

A. Just so say we pick one against the other, I cannot say we do. We may have a one-way bridge in a side road that we have constructed and did not reconstruct the bridge.

Judge Glenn: I mean in choosing the weak bridges to repair, have you sought to repair those on the roads carrying the most interstate and intrastate traffic, or have you discriminated against those bridges?

A. We do not wish to discriminate, but it is our policy to go back on the roads we have reconstructed and to give priority to the weak bridges.

By Mr. Griffith:

Q. I ask you this question. I think it is a question of law, but under the State Highway Act were you required by the State Highway Department to do work in every judicial circuit?

A. Yes, sir.

Judge Glenn: That is true, but you haven't made the point I am getting at. The bridge between Spartanburg and Greenville, the Thickety Creek bridge, for example, is on one of the roads that these gentlemen are most interested in. Have you as a policy, discriminated against the early [fol. 226] strengthening of such a bridge, or have you rather favored the strengthening of such a bridge—the bridges that are most important in the highway system?

A. I don't know that we have discriminated against them.

Judge Glenn: Have you sought to meet the needs of the heavy traffic, regardless of where it is, or have you discriminated against it?

A. We have probably done some of both. We have sought to meet the needs of the people, getting the people out of the mud and dirt. That is our main object, and we have tried to get back to those other bridges as fast as we can. We have widened a good many little narrow bridges on the main road between Charleston and Orangeburg, and we widened quite a number of bridges that were necessary.

Judge Glenn: I put the question in a leading form. Your haven't tried to discriminate against trucks moving in interstate commerce in your policy of repairing weak bridges?

A. No, sir.

By Mr. Griffith:

Q. As a matter of fact, you are handicapped by lack of funds, isn't that your situation?

A. Yes, sir.

Q. You haven't got the money?

A. If we had the money to go ahead and strengthen all of them and to widen them, we would be only too glad to do so.

Q. You like to build good roads and bridges?

A. Yes, that is my profession and my practice.

Judge Glenn: Would you rather build one that is going to be used a little than one that is not going to be used at all?

A. Absolutely I would.

[fol. 227] By Mr. Griffith:

Q. Now, I was asking you about streets of cities and towns, as to that construction, have you observed that they have been damaged or cut up by heavy traffic?

A. Yes, I know this, that I have gone into several towns with this National Recovery fund, and have torn up some of the old streets in the city and put down new pavements and I have very often had requests from various towns to come down there and help us out, that the heavy traffic is tearing up the streets. We go back and we have torn up

and replaced pavements in several places and resurfaced a good many others.

Q. Now, if you were to continue a program of building concrete roads, would you be able to complete your highway system nearly as early?

A. No, not without we had funds a lot faster.

Q. In the present situation?

A. No.

Q. Is that the reason you departed from the concrete roads?

A. Largely. And we have spread out on what we say are secondary roads that don't carry heavy traffic, but lack of funds and wanting to spread the money over as large a margin as we could is the reason we are building more of that type than the concrete.

Q. Are all the revenues received by the State Department, motor vehicles, are they applied to road construction?

A. Yes, and road maintenance and retirement of bonds.

By Mr. Bell: What year are you speaking of—what period are you covering?

[fol. 228] A. Any period since we have been getting all of the revenues.

Q. You never have deferred any highway funds to other than highway purposes?

A. Yes.

Q. Are you sure of that?

A. Yes.

Q. You make reports to the Bureau of Public Roads on that matter?

A. As far as I know, we never have spent anything other than one cent on gasoline tax going to the County. The Highway Department gets the motor vehicle fees and five cents tax.

Q. The counties have about 90% of the roads to maintain and build?

A. Yes.

Q. Now how much has the State built in the highway system?

A. We have a system now that we estimate at about $111,000,000.

Q. How much has the Federal Government contributed?

A. Of that, about $25,000,000. Now the Federal Govern-

ment has contributed some prior to that. We got Federal aid prior to 1925, and we ran about $4,000,000 extra.

Judge Glenn: I thought those figures put in evidence yesterday showed $39,000,000.00.

A. I think $29,000,000.00 is about right.

Mr. Funkhouser: $10,000,000.00 allocated but not yet spent.

A. But this $25,000,000.00 is of the $111,000,000.00. If you run up to 1929, we have to run up $111,000,000.00, and we do not have that figured.

[fol. 229] By Mr. Griffith:

Q. How much bridge mileage do you have in the State Highway System?

A. About fifty.

Q. About fifty miles of bridgework?

A. Of all types.

Q. What percentage of that mileage would you say has been designed to carry a load not in excess of ten tons?

A. Probably around 75%, I would think. I have not checked that up accurately.

Q. How does the cost of bridge construction compare with the road construction—is it a substantial item, the bridge cost?

A. It is a very substantial item. The cost of bridges runs anywhere from $50.00 a lineal foot up to $200.00. The average price is between $80.00 and $100.00 for a 20-foot width bridge.

Q. How about road cost?

A. The pavement costs have been running between $30,000.00 and $35,000.00 a mile. That is a little less than the bridges.

Judge Parker: I am troubled about this. I understand until three years ago you could load 40,000 pound loads on the bridges. Do you have any failures, or did you have failures of bridges at that time?

A. Well, on the timber bridges particularly, we were constantly having to replace boards. Some of them, we had to put extra stringers in them, and in the maintenance of our bridges we tried to keep them up, but we have not

had any failures on the concrete steel bridges we have built.

Q. How long have you been connected with the State Highway System?

A. About fourteen years.

[fol. 230] Q. Did the Highway System make any recommendation to lower the weight of trucks?

A. Mr. Moorefield I believe made recommendations to the Legislature along that line.

Q. When was that?

A. In 1931, I believe.

Q. He recommended that the weight be lowered?

A. Yes.

Judge Glenn: Was there any control to that at all?

A. I don't remember the law then.

Judge Glenn: That was the first law they had?

A. I believe so.

Judge Glenn: They were putting an initial limit on it?

A. Yes.

[fol. 231] By Mr. Griffith:

Q. Do you find in your files a written statement which Mr. Moorefield prepared for the investigating committee?

A. Yes.

Q. Will you produce that please? I wish to call attention—I don't have the particular reference—I wish to call the attention of the Court to the special Act of the Legislature authorizing the investigation of motor vehicle transportation in 1931. We now desire to introduce in evidence a typed statement which Mr. Moorefield presented before that investigating committee.

Mr. Fun-houser: If there were certain statements picked out of the testimony before the Legislative Committee, it seems to me that we should have the whole benefit of the testimony instead of certain statements because there may be statements otherwise that we might wish to use.

Mr. Griffith: We have a report of that committee, the statements taken by that committee, and we offer that in evidence, but we want Mr. Moorefield's typewritten statement because it is contained in there in full.

Judge Parker: Why is that not competent and proper, Mr. Funkhouser?

Mr. Funkhouser: I thought probably there might be modified statements in the whole testimony. They might pick out what was favorable and the Court would not have the benefit of the background of the questions asked.

Mr. Griffith: You want the whole record to go in?

Mr. Funkhouser: I don't mind if they put the whole of the record in.

Judge Parker: If he has the whole, I think it is all competent because we are investigating the reasonableness of the Act of the Legislature.

Mr. Griffith: This is all we have and all that was taken, as far as we know.

[fol. 232] Judge Glenn: We have not got to the point yet of having stenographers take down everything the Legislative Committees say.

Mr. Griffith: We offer the whole record.

Judge Parker: Right at this point, are there any points that you want to make—if so read them.

Mr. Griffith: I would like to read the entire statement. It all bears on highway costs and the problems facing the state.

Judge Parker: Read such parts as are pertinent.

Mr. Blease: I suggest that we get through with Mr. Williamson before you read this.

Here defendant introduced statement presented by Mr. Moorefield, Chief Highway Engineer, before the South Carolina Legislative Investigating Committee being defendant's Exhibit Number 8.

By Mr. Griffith:

Q. Now, Mr. Williamson, as to the load that these concrete roads will carry. Have you had any experience and observation as to their weakening in any places?

A. Yes. We have had failures in concrete pavements. We have had corner breaks in the system at times. That is usually a pretty good failure, I mean the corner breaks—two head joints together with expansion strip between them and the outer edge of one of those corners breaks. We have quite a number of those about all over the State. We have had systems practically adjacent to bridges and over fills

and causeways and some places we have had no failures at all. We have had very good results.

Q. You have had like experience as to bridges too?

A. Yes.

Q. Now will you give us the width of the road?

A. Most of our pavements are eighteen feet in width. We have some twenty feet and some sixteen feet There is one little stretch in Sumter County that is only nine feet wide. That is a concrete pavement. Now in bituminous surface our roads are twenty feet and wider. The standard [fol. 233] is twenty feet and we sometimes widen where adjacent and close to towns or through different communities. The standard is twenty feet.

Q. How about dirt roads?

A. We surface them about twenty feet.

Q. With respect to the county roads, about which we have been speaking—there are various types of roads and bridges throughout the county?

A. Yes, some improved and some unimproved.

Q. Some weak and some strong?

A. Yes, and that is particularly true with bridges.

Q. In your highway system have you taken over some roads which were actually paved by the county?

A. Yes.

Q. That is old paving, is it not?

A. Yes.

Q. Let me ask you this as an engineer: Does not an engineer have to know the weight the road is going to have to bear in order to design that road?

A. That is desirable to know, of course.

Q. Is that not the only purpose of his designing?

A. Yes, it is.

Q. Would you say that an enormous amount of truck traffic, the evolution as the plaintiffs call it,—did you contemplate it as an engineer back in the old days in building those early roads?

A. We did not know about that then.

Q. Are those old roads scattered all throughout the highway system—that is they are not all combined in one road?

A. That is true. There is not much mileage of that. Most of the state highway has been constructed by the State Highway System. Sumter, Anderson, Greenville, Richland and Charleston are practically the only counties that had

any roads paved prior to the state highway department.

Q. I am asking you about the old streets. Are they narrow or wide?

A. Some are wide and some are very narrow.

[fol. 234] Q. Take as an illustration the town of Newberry. When a long truck comes through that town and turns one of the corners, how much of the street does he take?

A. At the corner of the Exchange Bank Building that is a pretty narrow intersection and it takes a good bit of the street there for an automobile and truck to pass.

Q. A long truck would have difficulty in turning that corner, as a matter of fact?

A I think so.

Q. And those conditions apply in other towns?

A. Yes, we have quite a number of towns with narrow streets.

Q. Charleston is particularly an example of narrow streets, but I believe Columbia is generally about as wide as any city in the State.

A. That is true.

* * * * * * *

Q. In the construction of your paved roads, do they have a center joint?

A. The ones we are constructing now do have. The earlier days they did not have. We began center-joint construction about 1929 or 1930. The roads constructed prior to that did not have center joints.

Q. Could you give a rough estimate of how much of the 2400 miles does have the center joints?

A. About 40% has center joint, and concrete pavement.

Q. What are the thicknesses?

A. We have two thicknesses; one is eight inches at the edge and six and a half at the center. The other is seven and a half at the edge and six inches at the center Those are our two. We have used the thicker centers generally on relocations, fills, causeways, and so forth, and the thinner section where we follow an old road or cut centers.

Q. What do you know about the strength of concrete?

[fol. 235] A. Very little—that is in a way. We make tests of pouring concrete when we pour it, for its compressive strength and things of that nature, but as to what load a concrete pavement will hold up, that is pretty indefinite.

Judge Parker: There is no doubt about these new roads you build on main highways supporting the loads of the heavier trucks?

A. How heavy?

Judge Parker: 18,000 pounds per axle.

A. I would think so; if we have good conditions they should support that without trouble.

By Mr. Griffith:

Q. You, of course, don't know the construction of the roads which you took over from various counties?

A. No.

Q. You all did not have anything to do with that?

A. No, we have been maintaining them, except I do know this that in Anderson County I know about the construction of those particular roads there.

Cross-examination.

By Mr. Funkhouser:

Q. In which state would you say are the better sub-soil conditions, North Carolina or South Carolina?

A. I would judge generally that they are about the same. We have several different classes. We have sand subgrade along the coast, and some gumbo sections in our state, sand hills, mountainous sections and clay. North Carolina is somewhat similarly located; they go from the mountains to the coast.

Q. On your main through highways is it not a fact that you have a very good sub-soil condition, but which will let water drain off?

A. In some sections, yes. I would say the conditions on route one is about the best that we have.

Q. Is it not also true in South Carolina that you have a lesser problem with frost than North Carolina has?

A. Generally speaking yes.

Q. Frost does not go as deep?

A. We of course have roads going to Caesar's Head in [fol. 236] the mountains though where the temperature goes to zero.

Q. But the frost is not deep enough in this state to disturb your roads?

A. Last year we had probably more trouble with them than in a number of years. We had more ice and snow last year.

Q. But that is an exceptional year?

A. Yes, it was exceptional

Q. Is it not a fact that your roads in this state are well constructed?

A. I think we enjoy the reputation of having as good roads as anyone in the country, of which we are very proud.

Q. Is it not also a fact that your county roads were built at greater thicknesses than a number of people thought it was necessary to build them and there was a lot of criticism and talk about it?

A. I don't know that.

Q. In your opinion does a heavy bus going at a high rate of speed do as much damage to a highway as a heavy truck?

A. It depends on the weight and the smoothness of the pavement.

Q. Let's take this situation—take a truck weighing exactly the same as a bus, both of them over 20,000 pounds, going at the same rate, will one do more damage than the other?

A. I don't think so, if they have the same wheel loads.

Q. Really the test is whether the wheel load or axle weight does the damage.

A. The wheel load is what comes in contact with the pavement. If you have rubber against concrete, regardless of what is above it, traveling at the same speed I think you have the same result.

Q. It is the axle weight or wheel load that counts?

A. On the pavement, it is. Under other conditions it would not.

Q. Why is it that the buses in South Carolina are exempt from the law and the trucks not, if they both do the same amount of damage?

A. The Legislature permits the buses to operate. We are abiding by what the Legislature does. They are our bosses.

Q. Was that upon the recommendation of the State Highway Department?

A. No.

Q. Did Mr. Moorefield recommend it?

A. Mr. Moorefield was dead when they passed that law, I think.

[fol. 237] Q. When did he die?

A. April of this year, and that law was passed shortly after that.

Q. You mean the buses were exempted at the last Legislature?

A. Yes. They permitted the width to increase from 90 to 96 inches on buses at the 1936 Legislature. They were ninety before that.

Q. The weight law does not apply to buses either?

A. I don't know.

Q. But you think one does as much damage as the other?

A. If the conditions are equal.

Q. The buses weigh considerable—those going from Florida to New York are pretty heavy weights?

A. I judge so.

Q. They have been running over the bridges on the main highways?

A. Yes.

Q. You have not heard of them going through the bridges?

A. No, I haven't heard of any going through as yet.

Q. You have not heard of any trucks going through those bridges?

A. We have had floors to break on bridges from time to time, and they have knocked the handrails off very often. That is one of the biggest damages we have had from them.

Q. What axle weight did you recommend on route number one?

A. It depends on what you mean by route number one—taking it all the way through, we have surface treatment on that road.

Q. Get down to the general proposition—you have a highway in the State known as route number one that is traveled by buses and the public generally using automobiles?

A. Yes.

Q. What axle weight can the road carry before the road would be damaged?

A. You mean for the full length of the road?

Q. I mean as to the law of the State.

Judge Glenn: To be fair to you, he has testified there is a small section on the northern end where there is one

very weak bridge—you are talking about the ninety per cent.

A. Of course to make a recommendation on that, my idea of the road is just like the old saying that a chain is [fol. 238] no stronger than its weakest link. A road is no stronger that its weakest section. If you recommend for the weak road, probably 5,000 or 6,000 pounds axle load would be plenty high for that particular section. Other sections it might go even higher than that. When we get that section reconstructed up there at Cheraw like we have under contract now, that will eliminate the only weak spot on that road.

Q. Assuming that 90% of the road has no weak spots. What axle weight would you recommend for that?

A. I would think 12,000 or 13,000 pounds axle weight could be used without doing any material damage to the road.

Q. Is it not a fact that they have been running axle weights of sixteen to eighteen thousand pounds over that road and the 90% has not been damaged as yet?

A. That is true, but we have damage, probably, there that has not shown up as yet.

Q. How long is this weak spot on route No. 1?

A. About six or seven miles.

Q. How long is route No. 1?

A. Between 140 and 150 miles.

Q. It is the whole length across the state?

A. Yes.

Q. Do you know how wide the state is at the point traversed by that road?

A. It is about 150 miles—about 70 miles to Augusta and about that to Cheraw.

Q. Would you keep traffic off that 150 miles because of the weak spot to which you referred?

A. If traffic is going to bog down in the weak spots and block the whole route of traffic, I don't think it would be safe to permit loads going through that might absolutely close the road which should be used by at least 90% of the traffic.

Q. Is it not a fact that these weak spots can be strengthened?

A. Sure, and we are doing that now. We have a contract here now to get rid of that weak place, but it may be two years before we get it completed.

Q. And that weak place has not as yet bogged down?
[fol. 239] A. Yes, sir, there has been considerable trouble there. We have had water over that road in Marlboro County six or seven times within the early part of the year; when heavy loads went in they would get stuck, bog up and practically close the road to other traffic. We had to detour the traffic.

Q. You had some floods in South Carolina several years ago?

A. Yes. In 1928 and 1929 South Carolina had considerable floods and we are threatened with some this year.

Q. Did not the Federal Government appropriate money to repair damages to the highways?

A. We had some flood relief money.

Q. How much did you get?

A. I don't remember the amount now.

Q. But you got enough to repair the roads?

A. We spent what we could. We did not get enough to build all the bridges we would like to have built by any reason, however.

Q. There is now allocated to your state and not used, ten million dollars of Federal funds for your roads.

A. That sounds a little high to me. I don't know that we have any that has not been used. We are working under Federal, W. P. A and National program funds.

Q. In addition to the Federal allocation I understand you have emergency and N. R. A. money.

A. Yes.

Q. Don't you know that ten million dollars of the Federal Aid has not been expended by your State?

A. We have to go by that ten million dollars—we have 1938 and 1939 Federal Aid that will be coming up. We are spending Federal Aid on the bridge on route one at Cheraw.

Q. The bridges that you have stated are weak you are now repairing?

A. Yes; we are trying to go back and rebuild and rewiden bridges where they are too narrow or too weak.

Q. Don't you think you have the best highway system of any state in the southeast?

A. I say we enjoy that reputation and are glad to hear other people tell us that is true.

[fol. 240] Q. Do you, as Chief Engineer of the State Highway System, think that is true?

A. I think we have the best roads I have driven through.
Q. In the southeastern part of the country?
A. Yes, that is right.

Judge Parker: What good will that do if you have a very splendid road and on that road you have — weak bridge that will not bear more than a ten-ton load, or in the opinion of the Legislature will not bear more than a ten-ton load? I am addressing this question to you.

Mr. Funkhouser: My answer to that now is that originally that bridge may have been designed to carry a ten ton load, but the policy of his department, which he stated, is to repair the bridges and highway as the traffic increases, in order to carry traffic regardless of the theory or philosophy on which the road was built, and they are actually carrying the traffic at this time. They are carrying big buses going sixty or seventy miles per hour over the State, and the fact is that if the plans and specifications call for ten-ton bridges, these bridges have been strengthened to carry the traffic, and have been for years.

Judge Northcott: This witness testified positively that this bridge was a weak spot in route one, and is not safe in its present condition for more than ten tons, if I understood his testimony.

Mr. Funkhouser: If the witness is correct, my theory is wrong.

Judge Glenn: Your answer to that is that some of the big buses, say over 20,000 pounds, going over it day in and out, may any day put it out of regular schedule.

A. Yes. And some of these days one of those bridges may fall in and be too late to correct it. That is the reason we want to build it now before we have any catastrophes of that kind. It is not safe to let them continue. A heavy truck may go through all right, and yet a wagon may follow behind and break it in. It is sometimes what we call the "last straw."

[fol. 241] By Mr. Funkhouser:

Q. What test have you made on the bridges to determine the conclusions about which you have just testified?

A. We have measured them up, taken the size of the timbers, steel, and so forth in them, and worked them out from a formula to determine what is a safe load that does

not put a load on there that it will not carry. All bridges are designed for certain loadings, and in making that design you figure them to a certain degree of safety. We may say a bridge for ten tons, but a twelve or fifteen ton truck may go over it a few times, yet we figure that is not even safe.

Mr. Funkhouser: What tests, if any, have you made to determine how much that bridge of which you are talking, will carry?

A. We have made inspections of it and measured it up, and worked it sort of backwards from what you would to design it. Several years ago we made a survey of all the bridges in the State, and from that survey we figured up what at that time we figured was a safe loading.

Q. So you made measurements?

A. Yes.

Q. And you came to the conclusion that it would not be safe for anything over ten ton trucks?

A. Yes.

Q. What have you done to strengthen that bridge since you came to that conclusion?

A. We have replaced the floor of that bridge a time or two I think. I think we put a bat or two under it. We have strengthened the underpinning on it.

Q. Have you strengthened the bridge since you came to that conclusion?

A. We have strengthened it from time to time, and even if we do strengthen it that would not make the bridge safe over that road. We strengthened the bridge to keep it up.

Q. Will you please answer me my question? Have you or not strengthened that bridge since you came to the conclusion it was not safe for vehicles of more than ten tons?

A. I don't recall when that was done.

Q. Was it within the last year?

A. We have strengthened it from time to time—you see [fol. 242] we have had floods and have had to strengthen it.

Q. And you have been strengthening it from time to time?

A. Yes.

Q. And you have not wanted to leave the public in any danger?

A. No, we tried to keep it safe.

Q. And you have strengthened it to meet the demands of the traffic?

A. Right.

Q. So, after your inspection and you found that it was safe for only ten tons, you have brought it up to the necessary strength to carry the traffic of today?

A. I don't think so, but we try to keep it as safe as we can to carry the traffic by so doing.

Q. Is it safe to carry those buses that go through there to Florida?

A. They are passing over it.

Q. In your opinion?

A. I would say it is not too safe.

Q. If you know about it, have there been any warning signs put up there that the bridge is unsafe?

A. No.

Q. Or any warning to the officials of the companies operating those buses that it was unsafe?

A. No.

Q. So you, as Chief Engineer of the State Highway Department, feeling that that bridge is unsafe to carry passengers across, never have warned anyone?

A. We have tried to keep it strengthened so that no one would fall in.

Q. Is that not the answer—whatever design that bridge was built for, it has been strengthened to carry the traffic that passes over it, and the demands of the traffic.

A. It is carrying it but it may fall in at any time. I will be very glad when a new bridge is placed there. I will be glad when we can dismantle that old one, because it is more or less of a hazard.

Q. Have you any sign on that bridge as to what load it will carry?

A. I don't recall.

Q. Don't you know that you have not got one on it?

A. I have not been across it right recently.

[fol. 243] Q. Have you taken any steps to put one on it?

A. I don't remember that exactly, either.

Q. So, with that grave danger to the lives of the traveling public, you don't recall whether you have taken time to put up a danger sign there?

A. I don't think we have put up one there.

Q. You know you have not. It is not a question of thinking?

A. I don't recall.

Q. Is not what you have testified as to this particular bridge true generally as to all of the weak bridges of which you have spoken that you have strengthened them as the demands of the traffic needed?

A. Yes, in a limited way that is true. We have a number of bridges that are narrow and we have not been able to do anything about widening them. We have lots of narrow bridges that we have tried to widen, but you really have to rebuild them.

Q. You are widening them as you get to them?

A. Yes.

Q. And it takes sometime to follow out a well-planned program?

A. Yes, with plenty of funds it takes time to follow out even a well-planned program, but I hope some day we will have them all corrected.

Q. What would you recommend as to the limit of the axle weight or wheel weight of trucks and buses traveling on the highways of this state?

A. On our standard pavement I think the axle weight of around 13,000 pounds would be about right, not exceeding that, and even with that we have roads that that would be too much for.

Q. What?

A. We have roads that even 13,000 pounds axle loadings would be too heavy for.

Q. I am talking generally about your highways—do you say 12,000 or 13,000 pounds per axle?

A. Yes.

Q. Do you think your roads will carry that much?

A. Our pavements will.

Q. And the vehicles of greater axle weights are going [fol. 244] over the whole road now?

A. Yes, and we are having some failures.

Q. Can you say that those failures are due to trucks and buses, as a highway engineer?

A. They are due to a number of causes. That is probably one cause—subgrade conditions, floods, and a little frost of course, but I do know that we have this situation I described down at Tillman, where we have been detouring heavy traffic off of No. 17; it put ruts in it, and we are trying to prevent that now.

Q. After that occurred, did you strengthen that road?

A. Yes, we spent about $12,000 fixing that road up.

Q. And you testified in chief that you have not had any trouble.

A. Yes, but they have not had that traffic on it.

Q. So, if there is a failure on the highway, you strengthen that to meet the demands of travel?

A. Yes.

Q. And that is just like any other industry—for instance if there is a failure of machinery they strengthen or replace it?

A. Yes.

Q. I believe you stated that you recommend an axle weight of 12,000 or 13,000 pounds per axle for these highways?

A. I think that is about right, particularly for our pavements, but we have roads in the state that will not bear that.

Q. Please answer my question. Can you carry an axle weight in this state of 12,000 pounds with a gross limit of 20,000 pounds?

Judge Glenn: We will take his testimony in connection with the testimony of the other witnesses. Some of them testified the unit would weight ten or twelve thousand pounds, and therefore it would not afford over 8,000 pounds pay load.

By Mr. Funkhouser:

Q. I show you a drawing here of a particular trailer combination, and as I understand from the testimony of the engineer, if there is an axle weight of 12,000 pounds on each of the two rear, there would be 6,000 on the front, making a total of 30,000 pounds. Would you think the roads would be sufficiently strong to carry that?

[fol. 245] A. As far as the pavements are concerned, they would get by with 12,000 axle load, just as well as 20,000 gross on two axles with maybe 16,000 pounds. You see that 20,000 pounds gross load, as I understand, you can probably put 80% of that on each axle, which would make a 16,000 pound axle load. As far as the pavements are concerned, that 16,000 pound load would be more stress than the 12,000.

Q. The pavement carries all right the 16,000 pound load?

A. I think some have been going over at more than that.

Judge Parker: Did you not tell me you thought that the better roads were carrying 18,000 axle loads?

A. They probably will under good subgrade conditions. As a matter of fact, they had a train wreck at Allendale and the engine of the train went on across the pavement without breaking up the pavement. But that is a very good condition of the pavement there.

By Mr. Funkhouser:

Q. Mr. Williamson, I believe you stated that to take this bridge that was designed for ten ton trucks—did you design that bridge for that or for more than that?

A. More than that.

Q. How long is that bridge?

A. I don't recall.

Q. Approximately.

A. It is probably three or four hundred feet.

Q. Then that bridge, 300 feet long, would stand ten 10 ton trucks, each truck being ten feet long?

A. Our normal procedure in designing bridges for loadings is to have trailer trucks pass, one in each line of traffic, about thirty feet between them. So you have a long span that you can probably put several of the trucks in that span.

Q. If it is 300 feet long, how many ten ton trucks under the way the bridge would be designed will it carry?

A. I will say the length of the spans are not that long. Each individual span would have to carry its own load.

Q. So you can have a number of ten ton trucks?

[fol. 246] A. Yes.

Q. What is the difference in having two ten ton trucks one following the other than having a tractor trailer following each other?

A. With the same loads?

Q. Yes.

A. On the bridge there, the effect of it would be practically the same. The total load is what counts on there.

Q. Do you know the American Association of State Highway Officials?

A. Yes, sir, I know that organization.

Q. I believe some of your highway officials are members of that organization?

A. Yes, sir.

Q. Are you a member?

A. Yes, sir.

Q. Do you know the formula adopted by that Association for determining the load that a bridge should carry?

A. I don't remember. I know there is a formula. I don't remember it off hand.

Q. Isn't it true that the approved engineers' practice is to design bridges according to that formula?

A. Yes, sir.

Q. You say you don't remember if off hand?

A. Yes, sir.

Q. Isn't it true that total gross weight, which is represented by W. equals coefficient times L., plus 40?

A. That sounds like it.

Q. Aren't you designing all your bridges in this State according to that formula?

A. Yes, that is our formula, I believe, in designing our bridges.

Q. Doesn't that formula of W. equal C. times L. plus 40 give you the same strength for bridges that the 18,000 pounds axle weight does for highways?

A. I don't follow you exactly on that: I don't know.

Q. You don't know? Are any of your bridges in the State designed according to that formula today?

A. That is probably the formula we use.

[fol. 247] Q. How long have you been using that formula?

A. I cannot say that either.

Q. You have been using it for some years?

A. We have had every design of bridge construction to keep up with the progress of the times, and the changing, and I think we have kept pretty well along with the Association's recommendations.

Q. Is that the formula used by the Bureau of Roads?

A. I think so.

Q. And isn't that the formula that the Bureau of Roads requires to be used when you get Federal Aid money?

A. Yes, when we design our bridges for Federal aid, that is the formula we use. We use the plans and specifications that they approve.

Judge Glenn: They have to approve them before they give you the money?

A. That is right.

By Mr. Funkhouser:

Q. Doesn't that formula for bridges take care of any loads for 16,000 pounds per axle weight, it takes care of the wheel weights?

A. I think so. We design our roads as prescribed by the Federal Bureau. Our bridges we build now are designed for heavier loads than a few years ago.

Q. The bridges on those Federal Aid roads will carry the loads according to that formula?

A. The ones built by that formula, yes.

Q. That is not my question. Those curved places and shoulders carry loads according to that formula?

A. Some of them are not.

Judge Parker: He didn't ask you that question. He asked you whether they would carry it, not whether they were built for it?

A. Not all of them, no.

By Mr. Funkhouser:

Q. Which ones won-t, of the arteries across the State?

A. That depends on whether we build them as Federal projects or not.

Q. I am talking about Federal aid?

A. The Federal aid bridges throughout the State on the [fol. 248] main arte- traffic?

Q. Aren't the main arteries Federal aid projects?

A. No, sir.

Q. Aren't the main arteries across this State federal aid highways?

A. Generally yes, but it is not all with Federal aid money. Some of them are constructed with State money.

Q. I am asking you about the main arteries across the State; are they Federal aid highways?

A. Some of them are, yes.

Q. I ask you specifically?

Judge Parker: Answer the question direct Aren't those main arteries across the State—you said many of them were Federal aid projects.

A. Not Federal aid projects. We have constructed roads in the Federal aid system without Federal Aid.

Judge Glenn: They are all roads constructed by Federal aid, but there may be miles in them which have some other history than actual Federal aid.

A. I remember Black River out of Manning—we constructed that road a few years ago with Federal aid, and made exceptions to the bridges. The bridges were not constructed with Federal aid. That is very often the case. If we have a bridge on the road that we feel is adequate to carry the traffic, we omit the bridge.

Judge Glenn: The bridge at Catawba River at Rock Hill was built before Federal aid was ever heard of and it is adequate today, but not a Federal bridge. That is what you are talking about?

A. Yes, sir.

By Mr. Funkhouser:

Q. Is route 17 a Federal aid highway?
A. Yes, sir, I think so.
Q. Is route 15 a Federal aid Highway?
A. Yes.
Q. Is route 29 a Federal aid highway?
A. Yes, sir.
[fol. 249] Q. Is route 21 a Federal aid highway?
A. Yes, sir.
Q. Aren't those main arteries or highways that are used by interstate commerce crossing this State?
A. Yes, sir.
Q. And isn't it a fact that the bridges on those particular roads will all carry the traffic that the formula designs, to-wit: W equals C times L plus 40—your bridges?
A. No, sir I don't think so.
Q. Which ones are not?
A. No. 1, you see, that bridge at Cheraw is one.
Q. That is being repaired?
A. That is on number 1. When we get it built the new bridge it will, but the bridge under its present condition won-t. No. 17, for instance, we have a number of creosote timber bridges through Ridgeland and Hardeville; they aren't safe for very heavy loading.
Q. These bridges are now carrying the traffic that goes across them?
A. Yes, sir.

Q. And have been carrying it ever since the Federal aid roads were built, haven't they?

A. Yes, sir.

Q. And that bridge of which you spoke is the bridge you stated you strengthened?

A. Yes, sir.

Mr. Ross: May I ask the witness a few questions?

By Mr. Ross:

Q. Is there any authority in the State of South Carolina for the highway department, or any other authority to change the limits which the Legislature has put on weight and size? Is my question plain?

A. I don't believe the question is clear.

Q. Does your Commission or Department have any authority to change the weight and size and restrictions to meet special needs?

A. I don't know of any like that.

Q. It requires an Act of the Legislature to change that?

[fol. 250] A. Yes, sir.

Q. Does the State Legislature give the State Highway engineer authority to issue permits to move certain vehicles?

A. The loads which are beyond the limits as specified by law, a permit for a special movement? We issue those from time to time, yes. A load that is excessive in width and weight, under certain conditions we issue special permits for their movement.

Q. Speaking now from the standpoint of the observation of the State Highways, in your judgment would it not be a practical thing and a desirable thing to have some agency either the State or Federal, to have some authority to change these restrictions from time to time to meet special conditions that might arise?

A. I don't know just what you are driving at. It would if you had a specific maximum limit for some reason—a road might get into such a condition that it would not be suitable for carrying that load, it might be desirable that we had some quick way of changing it so as to take care of that particular situation.

Q. To change the weight to relate to the law?

A. Yes, such as we might have a flood, or a wash-out of the bridge and couldn't get the road back very quickly to take care of the maximum load as allowed.

Q. Wouldn't it be a practical thing for your Department to recommend some agency that had the power to change the restrictions, either to lower them or bring them up to meet the special conditions as they might change from time to time?

A. That might probably get a little complicated; it might be a little difficult to enforce. That could, of course, be worked out, I think.

Q. Suppose you had an extremely bad road, or an unusually bad condition, wouldn't it be a practical thing if somebody had the power in your department to study the facts and make a recommendation and put them into effect to save the roads?

A. I think so. It would be a very good thing to do so for a period of 30 to 60 days or something like that. That may be as long as necessary, and then put the limitation on.

By Mr. Funkhouser:

[fol. 251] Q. Isn't it a fact that the South Carolina Act Prohibits tractor-semi-trailers having 12,000 pounds on each axle?

A. Prohibits that?

Q. Yes.

A. I don't know. I am not familiar with the law on that.

Q. You don't know about that?

A. No, sir, I have nothing to do with the law enforcement. That is work I am not so up to date on.

Q. You know that the law does not permit over 20,000 pounds gross load, do you not?

A. Yes, sir.

Q. And you don't know there is a 10,000 pound axle limit on vehicles with more than two axles?

A. I don't remember that.

Q. And you don't know whether or not you can carry 12,000 pounds on an axle, do you?

A. Under the present law?

Q. Yes.

A. I don't know, sir.

Q. But you think that the roads will stand an axle weight of 12,000 or 13,000?

A. The pavements will.

Q. And lots of them are going over the other highways that are not paved, isn't that true?

A. Yes, a good many of them are and some of those are in force.

Q. If you take a tractor-semi-trailer with an axle weight of 12,000 pounds per axle, then you would have a gross load of 30,000 pounds?

A. If you put 12,000 on two of them and 6000 on the others it will make it 30,000 pounds.

Q. Wouldn't that be safe?

A. The paving would stand that load, I think.

Q. How about a four wheel truck and you have 16,000 pounds on the rear axle, how about that, is that safe?

A. A 16,000 pound loading will damage the pavement more than a 12,000 pound loading.

Q. Do you consider a load of 16,000 pounds on the rear axle safe?

[fol. 252] A. From the highway standpoint?

Q. Yes.

A. It is apt to do it some damage. It will stand it maybe for a good long while, but it is bound to break it down a little earlier than if it had a lighter load.

Judge Parker: He is making the distinction between what is safe for bridges and what is safe for roads. He stated in answer to the question I asked that he thought that 18,000 pounds axle load was not too great for the better paved roads, so far as the roads themselves were concerned. That is what I understand his testimony to be. He has gone a great deal further, but he said as far as the better roads are concerned an 18,000 pound weight per axle would not be excessive, and he said all of those roads have bridges on which the weight of 10 tons is the maximum and beyond which it is not safe. I don't know that he has changed that. He said a great deal about the different type of roads, but I understand that to be the purport of his testimony now.

By Mr. Funkhouser:

Q. With this axle load which you say of 12,000 to 13,000 pounds—that is what you think would be safe for the South Carolina situation?

A. Yes, for the different roads.

Judge Parker: Here is what I am trying to clear up. You are asking questions for one situation in South Carolina and he is answering for another. You are asking as to the South Carolina situation not to include bridges, and he is answering to include bridges.

Mr. Funkhouser:

Q. Is this 16,000 pounds axle safe for bridges?

A. A good many of them it is not.

Q. How about on Route 17?

A. On Route 17 we have a number of bridges below Charleston there that would probably not be safe for a loading of that kind.

Q. What would those bridges below Charleston be safe for?

A. I would say 10 ton loading.

Q. Per axle?

A. No, sir, gross load.

[fol. 253] Q. How much per axle?

A. I consider bridges as having total load on them.

Q. I ask you per axle?

Judge Parker: I think he has answered that clearly. I think that answer gives the axle load as the test for pavement strength, but the total load of the truck is the test for bridge strength.

By Mr. Funkhouser:

Q. Isn't it true, Mr. Williamson, that the formula W equals C times L plus 40 makes the test of the load going over the bridge the length of the vehicle?

A. Yes, that takes into account the length of the vehicle.

Q. Are any of those bridges long enough to have more than two trucks on them at the same time?

A. Yes, we have some.

Q. Are any of those bridges wide enough to have two trucks to pass on them at the same time?

A. All of them are.

Q. Isn't it a fact that those bridges have been strengthened and built up to the necessity of the traffic upon them?

A. I believe it says the load for the traffic that is using them.

Judge Parker: I want to ask you a question when you get through. I want to ask about the width of the truck.

As I understand, this is the only state in the Union that limits trucks to 90 inches. Why shouldn't 96 inches for trucks be safe on those arteries?

A. Well, in some cases it probably will, but again we have over a hundred miles of paving which is only 16 feet wide. Twice 8 feet is 16.

Q. Are they on the arteries of interstate commerce?

A. Yes, we have some that go from here to Newberry not more than 16 feet after you get out of Columbia.

Q. 96 inches take up fully half of it?

A. Yes, sir, fully half and when two of those meet, there isn't much room between them. As a matter of fact, my experience in meeting those 8 foot buses on the road of that kind, I usually hit the dirt. That is the safe thing [fol. 254] to do. I take my chances on the dirt rather than on the bus.

Judge Glenn: How wide are the Greyhound Buses, do you know?

A. They are 8 feet wide. They are 96 inches.

Q. They are going to run here?

A. Yes, sir, they are running here now. When I meet one on the 16 foot pavement, I hit the shoulder. I always do that with the automobiles too.

Judge Parker: And ordinarily you don't feel so good when you meet one of them?

A. I don't repeat the Sunday school lesson, anyway.

Redirect examination.

By Mr. Griffith:

Q. As to the cost of maintenance, does that amount to anything?

A. Oh, yes, it is a considerable item. We are spending a million and three-quarter dollars a year now—about a million and three-quarters—for maintenance of bridges and roads.

Q. In the State Highway System?

A. Yes, sir.

Q. Does the Federal Government contribute any part of that?

A. No, sir.

Q. Going back to the width—you said you ran on the shoulder when you meet the wide vehicles. Does traveling on the shoulder, the edges of the road, add to the maintenance?

A. Yes, it is a good bit more probably, it cuts the shoulder up.

Q. You have to keep the shoulders even?

A. If traffic stays off the shoulders normally, we keep grass growing up to the pavement and there is no wearing down.

Q. Where is the weakest part of the road?

A. The weakest part of the road generally is at the edge.

Q. You want to keep the traffic away from there?

A. We have designed pavement to correct that by making the edges thicker than the center.

Q. In your opinion and in the opinion of the State Highway Department since you have been connected with it are the heavy motor trucks bearing their proportionate part of their cost and maintenance?

[fol. 255] Judge Parker: How is that relevant?

Mr. Griffith: It is the design of the State law that all revenue derived shall be placed on those roads.

Judge Parker: It isn't a question of taxes, it is a question of size and weight. How does this question of the proportionate part of the expense have anything to do with that?

Mr. Griffith: We want to complete a State highway system in this state.

Judge Parker: We all agree it hasn't anything to do with the question here.

Judge Parker: Is that all of the testimony you wanted to put in out of order, Mr. Griffith?

Mr. Griffith: Yes, thank you, Your Honor.

Judge Parker: Let the plaintiff put up another witness.

[fol. 256] Mr. J. Ross Hanahan, a witness for the plaintiffs, after having been duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

I live in Charleston, South Carolina, and am President of the Planters Fertilizer Company, manufacturers of com-

mercial fertilizers. The gross output of my business per year is around 50,000 tons of commercial fertilizers, worth a million one hundred thousand dollars. We ship by truck into North Carolina, South Carolina and Georgia. The nature of our business has changed very much in the last few years. The State of South Carolina uses around 650,000 to 700,000 tons of commercial fertilizers, a large part of which goes out of the State and is manufactured in the State. The South Carolina manufacturers have to compete with outside manufacturers. The percentage of our principal plant in the last three years from nothing has increased to around 31½% to move by truck in the whole State of South Carolina; 50% is now moving by truck out of the interior plant, and out of the Anderson plant 100% is moved by truck. If the law in South Carolina were enforced it would almost stop the trucking business, the cargo load 20,000 pounds is such that you could not convey the material for a very great distance. Conditions today are different from what they were a few years ago. The farmers use 650,000 tons of fertilizer in South Carolina and he wants it at his cotton row and with the advent of the truck he is getting it at his cotton row. To go back fifteen years, we commenced to ship fertilizer in December, delivered it at the station, the farmer hauled it from the station in his truck to his barn and in the spring carried it to his farm. To day, the fertilizer business in the spring is finished in about 45 days. It comes directly from the manufacturer's plant by truck, a great part of it, directly to the farmer's cotton row or tobacco row. The farmers want quick deliveries and want it when he is ready to plant. That is the custom in the fertilizer business today. We could not make these deliveries by rail. The change in the manner of deliveries has changed the price of fertilizers. The expense of delivering to the farm is all con-
[fol. 257] tained in the price. If the gross weight of 20,000 pounds were enforced or the size of the truck cut down it would increase the price to the buyer and the service of delivering the fertilizer direct to the farm would be denied the purchaser. The things about which I have testified would apply to other merchants and fertilizer companies, to all the fertilizer companies doing business in South Carolina. The mileage for delivery of commercial fertilizer is gradually being extended from 30 miles originally around

the small plant to where they are being delivered in trucks as high as 250 miles, but ordinarily 150 miles and as the tonnage grows the extent of delivery will increase. My company is a plaintiff in this case and if the relief prayed for is denied we will suffer a loss of at least $3,000.00, and the same would be true as to the Merchants Fertilizer Company.

(No cross-examination.)

Mr. G. A. Howell, a witness for the plaintiff, after having been duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

I live at Rock Hill, South Carolina, and am employed by the Rock Hill Printing and Finishing Company, engaged in the business of finishing cotton piece goods. This Company does a large volume of business per year, it will average anywhere from fifteen to twenty million yards a month, amounting to about $35,000,000.00. This Company ships by truck, to a large extent, the trucks being loaded over 20,000 pounds in ordinary shipping interstate commerce. If the running of these trucks is stopped or the size of the trucks cut down it will increase the cost of our merchandise to the customer, as well as in the handling of the supplies, we would not be in position to compete with out of state competitors, allowing them to deliver to the customers at less money and with better service than we would be able to give. In our line of business wages have increased all over the country. We have about 1600 em- [fol. 258] ployees. If the law is enforced it would throw some of the business we are now getting to our out of state competitors and would cut down the necessity for the number of employees we now have.

(No cross-examination.)

J. A. SUTTON, a witness for the plaintiffs, after being first duly sworn, testified:

Direct examination.

By Mr. Beall:

I live in Charlotte, North Carolina, and am Secretary and Treasurer of the Horton Motor Lines, Incorporated. When this Company was organized in 1930 they had between 25 and 30 units of equipment, and at the present time operate approximately 270. We have through routes and joint rates with numerous other motor carriers. With our own equipment we operate in North Carolina, Virginia, District of Columbia, Maryland, Pennsylvania, New Jersey, Delaware and New York, but taking in the territory covered by our connections we serve the greater part of the eastern section of the United States. We withhold solicitations of freight on the lower classifications for delivery to our connection lines south of Charlotte, North Carolina, because the restrictions placed on operators in the State of South Carolina, if we were to actively solicit people for the lower classifications of freight, which we can carry ourselves north of South Carolina profitably, we feel that we might flood them to the point, with that classification of freight, that the proportion of the rate would be so low compared with the exceedingly high rate with some other units, that we do not solicit the lower classes of freight for trucking into and through South Carolina, and we do not have connections to complete that movement. We do not feel in cases of that kind that we can, when we make these joint rates, take into consideration with connection lines that they are bearing that cost and make arrangements with them for a proportionately higher charge out of Charlotte if their operating costs are higher than those going north. We feel that we would be running afoul of the provisions of the Revenue Act [fol. 259] of 1935, which provides against discrimination, and such rates would be a discrimination in that movement South of Charlotte at a higher rate than for the same movement going north of Charlotte and we feel that if we propose such a rate it would be illegal. It is approximately the same mileage from Atlanta to Charlotte as from Charlotte to Richmond. If the provisions of the South Carolina law were enforced, our southern connections south from Charlotte

would have to increase the rate approximately 75% or more. If we have a rate where one shipper pays 75% higher rate going the same distance over a similar route and the same kind of territory than he would pay going in another direction, it is my understanding we would run afoul of a section of the Federal Law. I think as a practical proposition it is more important to motor carriers to comply with the Federal law and at the same time as a matter of fairness and without discrimination in rates, and also a compliance with the State law. If the South Carolina law were enforced on our connections it would cost us in damages in excess of $3000.00. Our Company is a plaintiff in this case. We operated in and through South Carolina from Charlotte to Atlanta until March, 1932. I think there is a direct relationship between the size and weights to the matter of service which motor carriers are required under the Motor Carriers Act to render. It has a direct connection to safety and reasonable rates. What I have said in connection with the rate situation, the operating cost, etc., affecting rates applies to the other operators who are plaintiffs in this case and to all motor carriers where it places a proportionately higher rate and where it means a higher cost.

(No cross-examination.)

M. M. STUART, a witness for the plaintiffs, was recalled, and having been heretofore duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

* * * * * * * *

[fol. 260] Q. Do you have a financial statement of your company?

A. Yes, Barnwell Brothers, Incorporated.

Q. For what year?

A. 1936, October 31st.

Q. What conclusions does it show they rated it?

Judge Parker: For what purpose is this?

Mr. Funkhouser: Showing the development of the industry, the stability of it.

Judge Parker: It doesn't make any difference if it is solvent, insolvent, prosperous or what not. If they are entitled to maintain this commerce, they are entitled to maintain it.

Mr. Funkhouser: The allegation of the Bill is that they have invested large sums of money which would be jeopardized and damaged.

Judge Northcott: Didn't you prove that by him on the stand. You went all over that.

Mr. Funkhouser: He didn't touch on that.

Judge Northcott: Didn't he develop how many trucks [fol. 261] he operated in his business?

Mr. Funkhouser: I wasn't going into that.

Judge Glenn: Mr. Stuart, the situation is this. Your company has increased and is rendering good service and expects to do so right on?

A. Yes, sir.

Judge Glenn: You have reason to believe that you will render adequate service to the public in the years to come?

A. Yes, sir.

Judge Glenn: And you have some money?

A. Yes, sir.

Judge Glenn: I think that is competent as far as it goes. Is that true as to the other companies in this case?

A. As far as I know it is.

(No cross-examination.)

Martin Johnson, a witness for the plaintiffs, after being first duly sworn, testified:

Direct examination.

By Mr. Funkhouser:

I live at Charlotte, North Carolina, and am connected with the National Convoy & Trucking Company, one of the plaintiffs in this case. We operate in interstate commerce 65 trucks. If the relief prayed for in this bill is denied we will suffer a loss of $3000.00. I am familiar with the highway running from Cornelia, Georgia, on through toward Asheville only by observation on the map. I have never traveled it. The testimony given by Mr. Sutton would apply equally to our Company.

(No cross-examination.)

Mr. Funkhouser: I am through with all the witnesses on the subjects we have covered. I have one or two more, that is all. I have an accountant who has made a study of the [fol. 262] records of the Highway Department. These records will show the contribution of these trucks and automobiles to the various uses of the highway.

Judge Parker: We ruled that out on the other side.

Mr. Funkhouser: I know you did. I want to make the proffer of it. It will show that 60% of the gross income comes from the automobiles and trucks of the State.

Judge Parker: The plaintiff proffers proof by the witness, Mr. H. E. Gooding, a certified public accountant. That he has examined the records of the State Highway Commission and that with Federal aid, 60% of the gross income of the State of South Carolina comes from trucks and automobiles.

Mr. Blease: You mean for road purposes?

Mr. Funkhouser: No, sir, I mean gross income of the State. We might add to that our proffer to prove the income from trucks, automobiles and railroads and make the comparison of the income from other sources in the State of South Carolina. We proffer to prove that the amount paid by trucks alone and gasoline and license fees is expended for the maintenance of the highways in South Carolina.

Judge Parker: None of this testimony is relevant. It is incompetent, irrelevant, immaterial and throws no light on the issues involved in this case.

Exception noted by plaintiff.

Judge Parker: The Court excludes it, having heretofore excluded similar testimony on the part of the defendant.

Mr. Griffith: I offer to prove that they are not paying their share.

Judge Parker: When you get to your proof, you can offer what you want.

T. J. Burke, a witness for the plaintiff, having been heretofore duly sworn, was recalled and testified:

[fol. 263] Direct examination.

By Mr. Funkhouser:

Mr. Funkhouser: Judge Glenn asked for information with regard to actual tonnage in Charleston.

Judge Glenn: All right.

A. In 1934 for exterior movement from Charleston, 36,778 tons and in 1935 75,780 tons.

Judge Glenn: And moved by rail to the port and moved by ship beyond port in exterior trade.

DR. HARRY TUCKER, a witness for the plaintiffs, having heretofore been duly sworn, was recalled and testified as follows:

Direct examination.

By Mr. Coleman:

Q. Some question has been raised here that even though 16,000 or 18,000 pound axle weights are needed to break highways, the thing that is needed to break bridges is gross weight of the truck. Have the American Association of State Highway Officials and the Bureau of Roads an approved formula as to that?

A. Yes, they have.

Q. Will you tell the Court what it is and explain about that—whether it is gross weight that breaks bridges?

A. The gross weight for designing bridges is W equals C times L plus 40, where the C is a constant depending on the weight of the vehicle using the roads. L is the length of the vehicle, on combination vehicles from the front axle to the extreme rear axle and 40 is a constant. That is the formula that is recommended in designing highways. We have three classifications. One is known as the H10 classification, which means a ten ton truck. We have the H-15 classification. That means a 15 ton truck. We have an H-20 classification. That means a 20 ton truck. The nature of the constant in this formula varies depending on the weights and class of vehicles using the highway. For [fol. 264] the smallest, which is H-10 ton truck, the constant is 670; for the H-15 trucks, the constant is 1010, I believe, and for the H-20 trucks, the constant is 1340. Now, as far as my information goes all of the bridges in the southern section of the United States have been designed for the H-10 loading. That means a ten ton truck. Now that does not mean that you put a single vehicle on the bridge. In designing bridges you must design a bridge for

the most extreme conditions we can get on it. The most extreme condition is—for a two-way bridge or a double track bridge, the most extreme conditions are two rows of trucks following each other. In the case of the H-10 loading that would be two rows of trucks, each truck carrying 10 tons, or 20,000 pounds. The general spacing for those trucks is 14 feet, axle to axle, that is, the distance from the rear axle of the end truck to the front axle of the other truck is 14 feet. In other words, you can get the H-10 load—it is perfectly safe to put axles on the bridge in succession on which the front axle carries 8,000 pounds and the rear axle carries approximately 16,000 pounds. That is the explan-tion of how we design highway bridges and how highway bridges have been designed in this section of the United States ever since I have known anything about it.

Q. To make it clear to me and to laymen who don't understand certain terms, isn't it true that the important thing in carr-ing loads on bridges is to prevent the whole load from being on one span like that (indicating) but to distribute it on one or more spans?

A. The main thing is to so load your bridge that the members will not be stressed to the maximum amount and that will obtain when you have crossed it.

Q. Isn't it true that you want to distribute the weight over two or more spans.

A. Yes, sir.

Judge Glenn: The constant is the unit you have to support in the length covering the bridge? Gross weight is [fol. 265] not the test for the bridge?

A. No, sir.

Q. That is your constant of 670?

A. Yes, sir.

By Mr. Coleman:

Q. Isn't the approved constant 750?

A. I don't know what the approved constant is.

Q. Let's take the smallest constant of 670 and a 30 foot tractor-semi-trailer—won't the result of that formula be 670 multiplied by 30 plus 40, or 42,000 pounds?

A. Approximately so.

Q. So that the smallest constant that you would have in

the classifications about which you spoke, or maximum weight, is 42,000 pounds?

A. On tractor-trailers, yes.

Q. And that 30 feet will be distributed ordinarily on bridges on one or two spans?

A. Do you mean spans on the truck?

Q. The bridges are supported by beams, as I illustrated here?

A. We use the word "span" in a little different sense.

Q. I don't know, but the bridge is supported at some one point?

A. Yes.

Q. And the load is distributed over more than one point?

A. So that the load will not be on one panel of the bridge.

Q. So the load does not break the bridges?

A. Absolutely not.

Judge Parker: Let me see if I understand you. You say these bridges that have been referred to as weak bridges, are so constructed that the entire weight of one of these large trucks cannot fall within a span? I am using the "span" in the sense in which counsel used it, between points where the weight is divided.

A. It is difficult for them to fall within those points, in the ordinary construction.

Judge Parker: I am not speaking about what is ordi-
[fol. 266] narily difficult. We are considering a practical proposition. One witness has testified particularly that the Pee Dee River Bridge was unsafe for a greater weight than a ten ton truck. As I understand, counsel is attempting to prove that it is the weight on the axles and not the weight of the truck that is determining. Now, I want to know whether or not you are prepared to testify that these bridges are so constructed, that he has referred to,—that these bridges are so constructed that the entire weight of the truck will not fall upon any particular part of the bridge?

A. I can't answer that. But in further explanation I will say that the gross load of the vehicle, or 20,000 coming on the bridge between supports——

Judge Parker: You call that a pound?

A. Yes, sir, I call that a pound on the bridge. That load may produce a greater stress than if you had two vehicles

each of 20,000 pounds following each other on the same place. It is a question of where you put that particular load. It is rather technical. I can't go into it much further. The point I am trying to make in my testimony is this: When you say a bridge is designed for a ten ton vehicle, that means the bridge is designed for the vehicles following after, each of ten tons, because that is the most loading you can get on a bridge. Not only that, but you can put trains of them, each behind the other.

Judge Parker: Up in Western North Carolina I have seen a big truck down in the creek; the bridge had gone with it. It struck me that it was too heavy for the bridge.

A. That is probably so for that particular short span right in there. The panel length may be so proportioned to the length of that truck that the greatest load came not when you had that bridge fully loaded, but when you had that one vehicle right there on that particular point.

Judge Glenn: You have studied the highway business [fol. 267] generally. Suppose you had trucks in threes upon Highway No. 1, a highway that was designed to carry heavy traffic, would it be advisable, under your previous testimony here, to so control the traffic of these very heavy trucks over bridges so as to avoid the putting of five or six of them on at one time, without seriously impeding the interstate commerce?

A. I don't believe that would be practical, Your Honor, because there would be certain cases in which you couldn't control it. If you got those on there the bridge might fall. If I were highway engineer I would prefer to go back and reinforce the bridge to carry the extreme case.

Judge Glenn: I mean to take care of an emergency.

A. I would put an officer there and wouldn't let but one or two or three trucks, as the case might be, proceed over the bridge at the same time. That is done many times.

Q. Are you prepared to say from your knowledge of bridge design, and your knowledge of the bridges in this particular part of the country generally, what the average length of the panel is on a bridge?

A. No, it is impossible, they vary so widely.

Q. Are you familiar with the bridge which Mr. Williamson spoke of this morning?

A. You mean on route No. 1?

Q. Yes.

A. No, sir; I am not familiar with that bridge. It is one section of the state highway system I didn't ride over.

Q. Well, if you were told that heavy traffic has been going over that bridge for several years, trucks and buses weighing over 20,000 pounds up to 30,000 pounds, would you expect that bridge if it were weak to have given way within a space of three or four years?

A. That is hard to tell, because bridges that are weak have some way of continuing in use even though you could prove they should fall down. I would investigate bridges, determine what load they would carry, and if they wouldn't carry certain loads, I would post a notice to that effect.

[fol. 268] Q. Would undue stress on a bridge like that be inclined to appear on the bridge?

A. I believe that is a wooden bridge, isn't it?

Judge Parker: Yes.

A. You can't figure stress on a wooden bridge like that, I don't believe, very well.

Mr. Funkhouser: I would like to have it admitted that the State law has not been enforced since its passage in 1933. I don't suppose that will be denied, will it?

Mr. Lyles: No, sir.

Mr. Blease: You have enjoined it all the time.

Mr. Funkhouser: I beg pardon. None of the plaintiffs in this case have.

Judge Parker: It is admitted that the Act has not been enforced because its enforcement has been enjoined by various parties.

Mr. Blease: Yes, sir; we will agree to that.

Mr. Funkhouser: Will it be admitted the inter-state roads, three or four—I will name them—have been in use for the period by these heavy trucks, since 1930 without any restriction?

Judge Parker: Better name the roads.

Mr. Funkhouser: Road 17; 15-A; 1; 29; 25.

Mr. Griffith: We will admit that they have been open to use to all kinds of trucks and vehicles, but the extent it is impossible to even prove, I suppose. They have been open for traffic.

Judge Parker: They have been open for traffic and have been used by trucks and other vehicles.

At this point, Mr. Funkhouser offered in evidence five affidavits.

Mr. Griffith: We don't object to the form of the evidence. [fol. 269] We do object to its relevancy, and upon the further ground it is cumulative and is unduly burdening the record.

Mr. Funkhouser: On the question of relevancy, they have admitted similar testimony without objection during the trial.

Judge Parker: He objected to this line of testimony, and I told him he need not keep it up, because in a hearing in equity the Court was assumed to have considered only relevant evidence. Let it appear plaintiffs offer the affidavits of the following: E. F. Skidmore, P. W. Lowry, Russell Borjes, Ashmead Pringle, Jr., Frank Brumby Wellons.

Judge Parker: The defendants do not object to the form of this testimony, and do not object that the testimony is offered in the form of affidavits, and not by the production of witnesses in open court. Defendants do object on the ground the testimony is irrelevant and cumulative. Objection overruled.

Defendants except. The affidavits are admitted.

[fol. 270] AFFIDAVIT OF E. F. SKIDMORE, SALES MANAGER, CHARLESTON DIVISION INDIANA FLOUR COMPANY, INC., A SUBSIDIARY OF GENERAL FOODS, INC.

Beginning three or four year ago a large movement of flour from the West Coast to the Atlantic Seaboard has been caused by a surplus of wheat west of the Rocky Mountains. This surplus exists because the natural foreign markets for this wheat have been destroyed by disparity between the price of American wheat and that of foreign countries.

The Indiana Flour Company in October of this year constructed a plant at Charleston, S. C. This flour moves by boat, in jute bags, in bulk, through the Panama Canal to the Charleston plant. There it is processed, self-rising ingredients added, and re-placed into family size packages. From this plant the re-packed flour is distributed to inland

jobbers and handlers of flour throughout the States of South Carolina, North Carolina, and Georgia.

Loaded on a truck flour makes a compact load. The average pay-load of these trucks is around 20,000 pounds, so that the gross weight approximates 30,000 pounds or over. One method of this transportation is to drop partial truck-load deliveries of this flour at various points on the route from Charleston at various South Carolina points and make final delivery of the load in Georgia or North Carolina, as the case may be.

Movement of this commodity by motor truck is required as a matter of economy and service, because, in the first place, speed of delivery is essential not only to the demands of the jobber, but to prevent deterioration of the product; in the second place, movement by motor-truck does away with the necessity for warehousing; and in the third place, movement by motor truck is cheaper to practically all of the communities which it serves. In the absence of Motor transportation those communities would be dependent upon flour shipped by rail in less than carload lots.

[fol. 271] While it cannot be said definitely what effect the enforcement of this law will have upon the policies of the Indiana Flour Company in regard to continuing operations in South Carolina, it can be surely said that it will substantially decrease the volume of business, for the reason that if the Charleston Division of Indiana Flour Company increases the price of this product because of increased transportation costs, the present North Carolina and Georgia business will be thrown to competitors and move through the ports of Wilmington and Savannah respectively.

The effect of the enforcement of this law will be that the price of flour to the citizens of South Carolina will be substantially increased. This increase can be approximated as 65 cents per barrel, or an increase of 15%.

The price of flour in South Carolina, as in North Carolina, Georgia and other states on the Atlantic Seaboard and Gulf Coast, is at a lower level than even those states lying near or within the Wheat Belt, for the reason that transportation by water from the West Coast through the Panama Canal to the Atlantic Seaboard and distribution from the Seaboard by truck to the point of use is cheaper than the rail rates from the Wheat Belt in the Middle West to those points of use.

Indiana Flour Company is but one of five major companies who are in the same business and have plants at Charleston, S. C. The other four companies are: Southern Gold Medal Company, Dixie Portland Flour Mills, Ballard & Ballard, Fisher Flour Mills Company.

This commodity is one of the major commodities moving into the Port of Charleston and a large portion of it moves in interstate commerce. The enforcement of this law will sharply curtail this movement and divert it to the ports of Wilmington, Savannah and other ports along the Atlantic Seaboard.

(Signed) E. F. Skidmore.

(Jurat omitted.)

[fol. 272] AFFIDAVIT OF P. W. LOWRY, COLUMBIA, SOUTH CAROLINA

For the last thirteen years I have been associated with various saw-mill operations in South Carolina as Traffic Manager, and am a Licensed Practitioner by the Interstate Commerce Commission.

The lumber industry in South Carolina has assumed its present major importance within the last fifteen years, particularly with reference to hardwood lumber.

Since the depletion of our timber land adjacent to the railroad lines, it has been necessary to move lumber by truck to the rail termini or to the mills, and in most instances it is found advantageous to carry it to the mill directly. Moreover, some of the mills here represented are from 1½ to 12 miles from any rail line, and are solely dependent upon truck transportation. This includes our largest as well as our smallest operations.

In the last few years, since the coming of good roads and the development of motor transportation, a large interstate movement of mill lumber takes place in South Carolina from these mills. This movement is north into North Carolina, Virgina and Maryland.

A survey of 23 saw-mills in the State shows an annual movement by truck of approximately 103,000,000 feet of lumber and 130,000,000 feet of logs. Twenty-one of these mills show an average of 17,854 pounds of lumber per load. This includes both intrastate and interstate transportation.

It is absolutely necessary for profitable transportation of the commodity in interstate commerce that the gross weight exceed 20,000 pounds.

New competitive conditions have been created in the lumber industry. The consuming public demands that shipments of lumber be sent direct to the point of use. Railroads are of course unable to give this service. In many instances the mills are located some distance from the railroad, and in most instances the point of use is located some [fol. 273] distance from the railroad.

In certain instances rates by truck are higher than by rail. Nevertheless, transportation by truck is demanded because of service rendered by truck transportation, which cannot be rendered by rail. For example, for delivery to point of use, and with regard to the Port of Charleston, certainty of delivery according to shipping schedules, and time of delivery.

Considerable quantities of lumber heretofore mentioned moving in interstate commerce moves north to the furniture factories of North Carolina and Southern Virginia. Should this law be enforced this interstate movement by truck will practically cease and this transportation will go back to the rails, at a serious loss of profit to a South Carolina industry and serious curtailment of service both in convenience and time to the consuming public.

(Signed) P. W. Lowry.

(Jurat omitted.)

AFFIDAVIT OF MR. RUSSELL BORJES, TRAFFIC MANAGER OF SOUTHERN GROCERY STORES, INC., ATLANTA, GEORGIA

My name is Russell Borjes. I live in Atlanta, Georgia, and am employed by Southern Grocery Stores, Inc., 682 Whitehall Street, Atlanta, Georgia, as Traffic Manager. We operate a chain of grocery stores with headquarters in Atlanta, Georgia. The majority of the capital invested in our Company is of citizens of Georgia. Our Company operates 380 stores, located in Georgia, Florida, Alabama and South Carolina. Our main warehouse is in Atlanta. We have a branch warehouse at Greenville, S. C. From our warehouse at Greenville, S. C., we deliver to our twelve stores in Augusta, Ga. Our Company has attempted to buy equipment to comply with the South Carolina weight

laws. The equipment we bought has decreased the size of the load that would be carried if it were not for the South Carolina weight law and has increased the cost of distribution of our products. The present average cost of distribution is 27½c per hundred pounds. If we could carry a [fol. 274] payload of 10 tons, to 20,000 pounds the average cost of distribution would be 16½c per hundred pounds, or an average saving of 11c per hundred pounds, which saving would be passed on to the public. Our Company operates upon the basis of making a small profit, we attempt to net 2% of our sales. This necessitates each factor of expense being kept to the minimum. As our Company is now obeying the South Carolina law, we are not permitted to fill our trucks to capacity, which is a factor in our present transportation costs.

(Signed) Russell Borjes.

(Jurat omitted.)

AFFIDAVIT OF ASHMEAD PRINGLE, JR., CHARLESTON, SOUTH CAROLINA, VICE PRESIDENT OF MERCHANTS FERTILIZER COMPANY, CHARLESTON, S. C.

The company operates a complete fertilizer plant and sells complete fertilizer and fertilizer materials. We have been in the fertilizer business since 1918 and under the present corporate form since 1931. I have looked over the records of our shipments made during the 1935-36 season, and I found that about 90% of out total motor transported tonnage was moved in trucks carrying a pay load of 12,000 pounds or more and 7% more of less, of the motor transported fertilizer tonnage moved in interstate commerce.

During this season we move about 12,300 tons by truck to areas in excess of 50 miles from our Charleston plant and furthermore, we shipped approximately 6,500 tons of fertilizer to the market gardening areas which lie within a radius of 50 miles of Charleston.

Inasmuch as fertilizer is a commodity which has very low value in proportion to its weight any regulation which decreases the pay load of fertilizer truck will automatically increase the cost of fertilizer transportation and will, therefore, increase the cost of fertilizer to the consumer.

(Signed) Ashmead Pringle, Jr.

(Jurat omitted.)

[fol. 275] AFFIDAVIT OF MR. FRANK BRUMBY WELLONS, SALES MANAGER OF THE BRUMBY CHAIR COMPANY, MARIETTA, GEORGIA

My name is Frank Brumby Wellons. I live in Marietta, Georgia, and am employed as Sales Manager of the Brumby Chair Company, Marietta, Ga., manufacturers of common chairs of all types. We sell these chairs principally in the southeast. We sell them in South Carolina. I am familiar with the limitations of the South Carolina law as to width and length. We ship 75% of our product by truck. We can ship by truck at less cost than by rail. The saving in transportation cost permits us to sell our product to the public at a competitive price, which saving is passed on to the public. It is necessary for us to use trucks of minimum width of 8 feet and if this width is decreased to 7½ feet as result of the enforcement of the width law in South Carolina it would decrease the size of our loads approximately 25%, which would automatically increase the transportation cost by that figure and this increased cost would have to be passed on to the public. Considering the competition between our Company and our North Carolina competitors, it would practically force us out of business in South Carolina for the reason that if we were compelled to add 25% to the delivery cost of our merchandise in South Carolina we would not be competitive. The same would be true as to all of our customers in South Carolina and points north. We could ship by rail except for the fact that the cost of delivering the goods by rail would run from five to twelve percent higher than our present average costs to deliver by truck. For instance, the L. C. L. freight rate from Marietta, Georgia, to Columbia, South Carolina, is approximately $1.00 per hundred pounds, and on an item of our manufacture costing $12.00 per dozen and weighing 100 lbs. per dozen, the cost would be $1.00 per dozen for delivery by freight, whereas, our actual cost records covering deliveries of the same item by truck to Columbia, South [fol. 276] Carolina, is less than 50¢ per dozen. In this instance it can be readily seen that the rail cost would be approximately double our truck cost. This would affect us materially in that the delivery cost of our product would be so much higher than the cost of similar merchandise sold by our competitors who are better geographically located. We would lose our markets due to the fact that

since 1929 we have established a definite sales policy in the State of South Carolina wherein we have continually had a delivered price for all items of our manufacture to store doors in the state, and to be compelled to ship by rail would force us into a field wherein we would be non-competitive, and we would lose our trade in the state and points north. It would decrease the amount of the flow of our product in interstate commerce. If the law were enforced we could not ship by smaller trucks for the simple reason that the operation of smaller trucks with the distance to be covered would involve excessive expense, and again it would make us non-competitive in South Carolina and points North. We couldn't go around South Carolina to points north for the reason that the only avenue into North Carolina from Georgia, other than going through South Carolina, is by way of Cornelia, Georgia, and Asheville, North Carolina. This is a narrow road, full of short curves and mountain climbs which make it a very hazardous highway for trucks of any size to travel. Since the South Carolina law was passed we have attempted to use that road and our experience in trying to deliver over this road resulted in our truck driver asking that he never be routed over this road again due to the fact that in more than one instance the curves were so excessive that when his large truck was making the curves he completely blocked the road for traffic coming in either direction. Our investigation of the driver's contention was verified when his truck got off the road in making this short curve, and he was compelled to block the highway for three or four hours until assistance could be had to get his truck off the road. In shipping over the route from Cornelia to Asheville the time in which the shipment is made is materially delayed and [fol. 277] this increases the cost of the shipment if the distance is greater. We could not remain in business and make shipments by truck over that road. The chair industry suffered during the depression, as did most all manufacturing industries, unless it might be stated that the chair industry suffered more in comparison, and this is brought out by the number of complete failures in our industry which took place during the depression. Those of our industry who weathered the depression did not operate full time. Some of them had long shut-downs and the majority of them ran from two to four days a week. Our Company weathered the depression and we had no shut-downs during the depres-

sion for lack of business. Our Company did not lose many days in operation during the depression due to lack of business. I attribute this to the fact that we established quick service and made it possible for the furniture dealers to buy in small quantities without being compelled to pay excessive freight charges. In other words, I attribute this to the fact that we could deliver by truck economically and in an efficient manner. When we established our truck service we did it primarily to enable the dealers to buy in small quantities and to avoid the expense of having to pay a minimum freight charge on shipments by rail, and by this I mean that when the depression started and dealers were compelled to retrench, they refrained from buying from such sources where they would be compelled to pay freight on 100 pounds shipment whereas the shipment might actually weigh only 20 pounds. In our truck service the dealer was compelled to pay the ratio of freight only on the actual weight of the shipment. Over and above that, we were eliminating the expense of hauling merchandise from the freight depot to the stores, and we eliminated completely the necessity of the dealer having to file claims against the rail carriers for damage to merchandise in transit, and the fact that the commodity is of a fragile nature it is nothing uncommon for freight claims to be filed on eight out of ten shipments made by rail. The damage occurring to shipments by truck as compared with shipments by rail is very trivial, and this is due primarily to the [fol. 278] fact that shipments by our trucks are handled only in loading and unloading. In other words, we do not have to break bulk cars such as is done in L. C. L. freight shipments at terminal points. Likewise our experience in handling our commodity for loading and unloading has been such as to teach us how to handle the goods with the least possible element of damage, and over and above this, in the event damage should occur to a shipment in one of our trucks, the merchandise is not delivered to the customer, but is brought back to our factory by the truck for repairs. Whereas, if railroad damage occurs, there is nothing to do but to refuse the goods and file a claim with the carrier. As an illustration and a comparison of two shipments going from our factory to Sumter, South Carolina. A shipment by our truck is loaded at our factory and is not touched again until it is taken off the truck at the dealer's store door. Whereas, the same shipment by rail freight

calls for our putting the shipment in our local freight depot at Marietta, Georgia, where it is loaded into a box car with other commodities and is brought to the distributing terminal in Atlanta. At that point it is unloaded and reloaded into another car with various other commodities and is taken over another line to Columbia, South Carolina. At Columbia this car is broken and our shipment placed in still another car of mixed merchandise for shipment to Sumter, and at Sumter it is unloaded in a freight depot where the dealer sends his truck to pick up the shipment. It can be readily seen that in the number of handlings a shipment of fragile merchandise by reaching its destination by rail freight has unlimited possibilities for damage. The method of merchandising has changed materially and excessively as result of the development of motor transportation. In "boom" days prior to the depression, furniture dealers maintain warehouses where they stored excess stock, and in those days the dealers bought in sizeable quantities. At the beginning of the depression they naturally adopted a retrenchment program and did away with practically all warehouse space. From the beginning of the depression until now furniture dealers have refrained [fol. 279] from carrying practically any stock other than that what is now on their sales floors. This, of course, resulted in small purchases from the factories and in our case, where a dealer in Columbia, South Carolina, used to buy ten to twenty-five dozen units of a pattern and carried its excess stock in a warehouse, he has, during the depression, and continues to buy in smaller quantities of one to five dozen, and as soon as delivery is made this stock is put on his sales floor. This in itself has made it necessary for the manufacturer to speed up his delivery in order to keep the dealers supplied with merchandise. This change has resulted in benefit to the public because it has enabled the dealer to materially lower his operating cost and his general overhead, which, of course, has resulted in his being able to offer his merchandise to the buying public at a lower figure. Motor transportation has not only helped us develop our business, but it has likewise enabled us to stay in business at a fairly profitable figure throughout the depression. Our Company has approximately 400 employees. If the South Carolina width and length laws are enforced it is entirely possible that it would cause some unemployment in our Company in that we would lose a

sizeable percentage of the volume of business we are enjoying in South Carolina and states north, and if we were compelled to reduce our manufacture program sufficiently to offset the business we would lose, we would either have to reduce the size of our operating personnel or go west for sufficient business to absorb the volume we would lose in South Carolina and points North. In other words, the flow of our business would be diverted to the west instead of to the north.

(Signed.) Frank Brumby Wellons.

(Jurat omitted.)

Mr. Lyles: Defendant admits the allegations of paragraph of the Bill numbered Arabic One, reading as follows:

1. That the plaintiffs, Planter's Fertilizer & Phosphate Co., and Merchants Fertilizer Co., with their principal [fol. 280] offices and places of business in the City of Charleston, South Carolina; Poole Transportation, Inc., with its principal office and place of business at Greenville, South Carolina; and South Carolina Produce Association, with its principal office and place of business in the town of Meggetts, South Carolina; are each of them a corporation, organized and existing under and by virtue of the laws of the State of South Carolina.

That the plaintiffs, Barnwell Bros., Inc., with its principal office and place of business in the City of Burlington, North Carolina; Horton Motor Lines, Inc., National Convey & Trucking Company, and Carolina Transfer & Storage Co., with their principal offices and places of business in the City of Charlotte, North Carolina; and Akers & Hudson Motor Lines, Inc., with its principal office and place of business in the City of Gastonia, North Carolina; are each of them a corporation, organized and existing under and by virtue of the laws of the State of North Carolina.

That the plaintiffs, Sarah A. Geraty, John W. Geraty, and Charles W. Geraty, constitute partnership trading as William C. Geraty Co., and are each of them residents of Yonge's Island, in the County of Charleston, South Carolina, and are each of them citizens of the State of South Carolina.

That the plaintiff, Dewey D. Maner, is a sole trader, trading as Maner Transfer Co., and is a resident of the

City of Rome, Georgia, and is a citizen of the State of Georgia."

Mr. Lyles: Defendant admits the allegations of the paragraph of the Bill numbered Roman 2, Arabic 3, reading as follows:

II

"3. That the jurisdiction of this Court is invoked because the subject matter of the action involves the rights of the plaintiffs under the laws and the Constitution of the United States and the amount in controversy, as to each of the plaintiffs, exclusive of interest and costs, exceeds the sum and value of $3,000.00, as will hereafter appear; [fol. 281] and because the suit arises under a law of the United States regulating commerce."

Mr. Lyles: Defendant admits the following sub-paragraphs of paragraph numbered Arabic 10: one, two, three, four, five, six, and seven, which read as follows:

"10. That the plaintiff, Barnwell Bros., Inc., is now and was for a number of years prior to the passage of such Act of South Carolina, engaged in the transportation of property in interstate commerce as a common carrier; that it offers by its own facilities or through connecting agencies door to door delivery and daily direct service in the District of Columbia, Georgia, Maryland, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, Virginia, and other States, and has branch offices and terminals at Atlanta, Ga., Baltimore, Md., Charlotte, N. C., Cumberland, Md., Greenville, S. C., Newark, N. J., New York City, Philadelphia, Pa., Shelby, N. C., and Washington, D. C.

That the plaintiff, Poole Transportation, Inc., is now, and was for a number of years prior to the passage of such Act of South Carolina, engaged in the transportation of property in interstate commerce as a common carrier, that it offers door to door delivery and daily direct service into, from, within, and across the State of South Carolina, from and to the States of Delaware, District of Columbia, Georgia, Maryland, New Jersey, New York, North Carolina, Pennsylvania, Virginia, and other States, and has traffic a-ents at Greenville, S. C., Atlanta, Ga., Baltimore, Md., Burlington, N. C., Chester, Pa., Richmond, Va., Charlotte, N. C., Paterson, N. J., and Kings Mt., N. C.

That the plaintiff, Horton Motor Lines, Inc., is now, and was for a number of years prior to the passage of such Act of South Carolina, engaged in the transportation of property in interstate commerce as a common and contract carrier; that it offers door to door delivery and daily direct service in the District of Columbia, Maryland, New Jersey, New, York, North Carolina, Pennsylvania, Tennessee, Virginia, and other States, as a direct and connecting carrier [fol. 282] of South Carolina, and has warehouses and terminals at Baltimore, Md., Burlington, N. C., Charlotte, N. C., New York City, Philadelphia, Pa., Richmond, Va., Washington, D. C., Wilkes-Barre, Pa., Cumberland, Md., Hickory, N. C., Greensboro, N. C., and Pittsburgh, Pa.

That the plaintiff, National Convoy and Trucking Co., is now and was for a number of years prior to the passage of such Act of South Carolina, engaged in the transportation of property in interstate commerce as a common and contact carrier, offering door to door delivery and daily direct service in Georgia, North Carolina, South Carolina, Tennessee, Alabama, and other States, with traffic agents at Atlanta, Ga., Chattanooga, Tenn., Greenville, S. C., High Point, N. C., Knoxville, Tenn., Spartanburg, S. C., Winston-Salem, N. C., and Birmingham, Ala.

That the plaintiff, Carolina Transfer & Storage Company, is now, and was for many years prior to the passage of such Act of South Carolina, engaged in the transportation of property in interstate commerce as a contract and irregular common carrier; that it has specialized in the movement of household furniture and goods in interstate commerce, which is an indispensable service among all the several states of the United States, but that 35% of its total traffic moves into, from or across the State of South Carolina.

That the plaintiff, Dewey D. Maner, trading as Maner Transfer Company, of Rome, Georgia, is now, and was for many years prior to the passage of the Act of South Carolina, engaged in the transportation of property in interstate commerce as a common carrier; that he offers door to door delivery and daily direct service in Georgia, North Carolina, South Carolina, Tennessee, Alabama, and Virginia, Maryland, Pennsylvania, New York, and other states, with terminals at Baltimore, Md., Philadelphia, Pa., New York City, Chattanooga, Tenn., Atlanta, Ga., Birmingham, Ala., and Rome, Ga.

That the plaintiff, Akers & Hudson Motor Lines, Inc., is now and was for many years prior to the passage of such [fol. 283] Act of South Carolina, engaged in the transportation of property in interstate commerce as a contract carrier, that it offers door to door delivery and daily direct service in the States of Connecticut, Georgia, Maryland, Massachusetts, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and other states, with traffic agents at Gastonia, N. C., Baltimore, Md., Newark, N. J., New York City, Reading, Pa., South River, N. J., Trenton, N. J., and Chester, Pa."

Mr. Lyles: We do not admit the other paragraphs concerning which counsel made inquiry.

Mr. Funkhouser: We are together on all except one, and that paragraph is as follows:

"II. That each of the plaintiffs hereto has made large investments of money, property and effort in the respective businesses in which they are engaged as alleged heretofore; that the necessary effect of the enforcement of the South Carolina Act will be to curtail the business of each of the plaintiffs, damage or destroy their investments in an amount, and reduce their lawful profits, in an amount, greatly in excess of One Thousand ($1,000.00) Dollars, for each month that they are thus unlawfully prevented from a reasonable use of the highways of the State of South Carolina."

Judge Parker: They say they do not admit that?

Mr. Funkhouser: No, sir.

Judge Glenn: You have introduced substantial testimony along that line, anyway.

Mr. Funkhouser: Yes, sir.

Judge Parker: Have you anything else?

Mr. Coleman: May it please the Court, we think possibly the Court got the impression from Mr. Williamson's testimony that when he said a bridge was designed to carry a ten ton load, that he meant that those bridges would not carry a semi-trailer tractor weighing from twenty to forty thousand pounds.

Judge Parker: What do you want to do?

Mr. Coleman: I want to prove what he meant was——

Judge Parker: Call your witness.

[fol. 284] HARRY TUCKER, a witness for the plaintiffs, having been previously sworn, was recalled and testified:

Direct examination.

By Mr. Coleman:

Q. You heard the testimony of Mr. Williamson when he said these——

Judge Parker: No, you can't prove what he meant. Prove anything else you want by this witness.

By Mr. Coleman:

Q. In engineering language, Professor Tucker, when a bridge is designed to carry a ten ton load, does that mean that only one ten ton load can be carried on that bridge?

A. No, sir.

Judge Glenn: We understand that—that it means as many ten ton trucks as can conceivably get on the bridge going both ways at the same time.

Q. Doesn't that mean that a tractor and a semi-trailer weighing 35,000 pounds could safely operate on that bridge?

A. Absolutely. The only difference would be instead of having two trucks following each other, you in effect connect by a draw-bar.

Q. So those are open to vehicles weighing 20,000 to 30,000 pounds?

A. Yes, sir, if they were designed for ten ton vehicles.

Judge Parker: Would that be sufficient—would a bridge designed to carry a ten ton truck support a line of tractors of that character going in both directions?

A. Absolutely, sir.

Judge Parker: What would be the weight of them? How long are these tractors?

A. The tractors are about—they range in different lengths, but around ten to twelve feet. The overall dimensions of the tractor and semi-trailer will run 28 to 35 feet.

Judge Parker: Then semi-trailer has the same capacity for going on there that a ten ton truck has?

A. That is correct.

By Mr. Coleman:

Q. And the tractor, plus the semi-trailer, is the equivalent [fol. 285] to two single trucks each weighing 20,000 pounds, and the effect of the tractor semi-trailer weighing 40,000 pounds on the bridge would substantially be no worse than two single trucks each weighing 20,000 pounds.

A. That's correct.

Q. The South Carolina law construes those two units as one, does it not?

Judge Parker: Oh no, you can't prove that. We will do that ourselves.

Mr. Coleman: That is all.

* * * * * * *

Mr. Funkhouser: When we appeared before Judge Glenn at Rock Hill, I made a motion before him for an interlocutory injunction on the ground that he alone could grant it under the authority of ex parte Hobbs, which I construed to hold that a single District Judge, where you had two grounds in your application, could grant an interlocutory injunction. I want to amend the former motion that we made then on the supersedure issue so as to base it not only on that ground, but also on the constitutional ground of a burden on Interstate Commerce.

Judge Parker: I thought that was what we have been trying to do.

Mr. Funkhouser: I want it to show in my motion.

Judge Parker: Is there any objection? The motion to be permitted to amend the motion is allowed.

Mr. Beall: If the Court please, we would like to offer in [fol. 286] evidence a certified copy of the original Senate Bill S-1629 which later became the Motor Carriers Act so that it will be available for comparison with the language of the Act as passed and the language in the bill at its original introduction.

Mr. Griffith: It is just as the Court prefers, but we presume that the Court will take judicial notice of the Committee report which we have already handed up. I don't see why he wants to encumber the record. I was going to suggest to the Court, that the Court has a right to look into the legislative history of the Act.

Judge Parker: I don't think there is any doubt about that.

Mr. Beall: I only wanted to be on the safe side. I only wanted to be sure that the documents were available to the Court, if the Court feels it can take judicial notice of these things, and incorporate them in the record.

Mr. Griffith: We admit they are before the Court.

Judge Parker: It is admitted by counsel for the defendants that the Senate Bill 1629, known as the Wheeler Bill with its amendments, which became the Motor Carriers Act, is before the Court and the Court can take judicial notice thereof, and plaintiff objects to the introduction of the bill on the ground that it will unnecessarily encumber the record.

Objection is thereupon sustained.

Mr. Funkhouser: I suppose this same rule will apply to all the various bills that lead up to the enactment of the Act?

Judge Parker: I think so.

Mr. Beall: Here is a matter which has no connection with the legislative history of the Act. There is only one page, one paragraph of this pamphlet, entitled "National Motor Freight Classification" on which motor carriers base their rates, and the page is No. 111A which contains a rule which was made necessary because of the conflicting State weight law.

Judge Glenn: Who made the rules?

Mr. Beall: The motor carriers.

[fol. 287] Judge Parker: It is filed with the Interstate Commerce Commission. I think we can take judicial notice of that, but you might put it in.

Mr. Griffith: We have no objection.

Judge Glenn: Read what it says.

Mr. Beall: (reads) "National Motor Freight Classification, D. R., under rule 13, page 111A, Section 2 of the rule:

"Volume ratings shown in this classification do not apply in states where provisions of law so restrict the payload limits as to make the applications of ratings invaluable or impracticable. In such states the carrier shall in rate making provide its own rules for volume ratings so as to comply with such restrictive law."

Mr. Beall: These are matters of committee hearings. It is not necessary to put in all the pages.

Judge Parker: It is not necessary to encumber the record. They are available to the Supreme Court. If the Supreme Court wants to see them, we have notice of them here. We can take judicial notice of that.

Mr. Ross: I desire to offer four sheets. They are statistics indicating the mileage in the various highway systems, including South Carolina, of different types of roads and for the United States as a whole indicating in a general way the necessary highway transportation system. The copies are certified. These are some that I think are unnecessary. I will detach those if permissible.

Judge Northcott: Does that include any statistics in regard to bridges?

Mr. Ross: No, sir, it does not, except that they may be included in the total mileage perhaps.

Judge Parker: Let them be received. Has the defense objection?

Mr. Griffith: None, except our standing objection of irrelevancy.

Judge Glenn: We think they are highly relevant.

[fol. 288] The Four Sheets of statistics referred to by Mr. Ross and offered by him are received in evidence and marked "Plaintiff's Exhibit 11."

Plaintiff rests.

Testimony Offered for the Defendants

Mr. Griffith: If the Court please, I thought of reading the testimony of Mr. Moorefield, but I do not think I will go into it except to give you a brief summary of what it covers.

Judge Parker: I understand the testimony is filed in the record?

Mr. Griffith: Yes, sir.

Judge Parker: Just tell us what it is about and read such portions as you think fit the Carolina States.

Mr. Griffith makes an oral statement, giving to the Court a brief summary of the salient points in Mr. Moorefield's testimony.

Judge Parker: Are there any matters in the report of the Legislative Committee's report that you wish to call attention to?

Mr. Griffith: Not at this particular time. I wish to offer in evidence at this time Senate Document No. 43. This was an investigation made by the Interstate Commerce Commission, or some branch of it, on the matter of the transportation industry. The purpose of offering it is to show both sides of the picture. We haven't attempted to go out and get witnesses to come in and contradict the plaintiff's evidence. We offer it for the purpose of showing the two sides of the question. It is a report by taking testimony of people, similar to what was taken here, from all over the United States. Senate Document No. 43, which was taken at the time of the consideration of this Act.

Mr. Ross: Is that a proposed report of the Examiner of [fol. 289] the Commission?

Mr. Griffith: Yes, Leo J. Flynn.

Mr. Ross: This is a proposed report. There was a report of the Commission which was to some extent adopted.

Mr. Griffith: This was a report of the facts, like a Master sitting on a hearing on which he was making a finding.

Judge Parker: Is that a document of which judicial notice can be taken or not?

Mr. Griffith: I think so, because that was a report of an Examiner who reported to the Commission and the Commission made its report and we don't know whether it was adopted or not. The final report of the Commission is in the I. C. C. report, and this was preliminary to that report.

Judge Parker: I am asking whether it is necessary to put it in the record or whether we can take judicial notice of it.

Mr. Funkhouser: We consent to it.

Judge Parker: It is consented that the Court take judicial notice of this document. Suppose you offer it in evidence and let it be admitted and it is understood in making up the record that this won't be printed, and copies of them may be used.

Mr. Griffith: I contemplated that at the time, not knowing what is in there at this time, I would like to suggest that the Commission's report which is either an exact or modification of this report, should also be included. That undoubtedly can be taken judicial notice of.

Judge Parker: All right. You can call attention to that in argument.

A. H. BOHLEN, a witness for the defendants, after having been first duly sworn, testified:

Direct examination.

By Mr. Griffith:

* * * * * * *

[fol. 290] Mr. Bohlen, what is your position?

A. Director of the Motor Vehicle Division.

Q. Of the State Highway Department?

A. Yes, sir.

Q. Did you make a tabulation as to the registration of motor trucks from 1933 to 1936 by rate capacities?

A. Yes, sir.

Q. Is that the tabulation?

A. Yes, sir.

Q. Is that taken from the record of the State Highway Department?

A. Yes, sir.

Mr. Griffith offers in evidence the tabulation referred to and same is received in evidence and marked "Defendant's Exhibit 13".

Q. Did you also make a tabulation of all motor vehicles, and if so, for what years?

A. Yes, sir; this was taken out of the Highway Department's annual report.

Q. For what years?

A. 1925 through 1936.

Mr. Griffith: Defendant offers in evidence the tabulation from 1925 to 1936 of motor vehicles, and same is received and marked "Defendant's Exhibit 14".

Judge Parker: What is the substance of these things? I like to know what we are doing as we go along.

Mr. Griffith: In 1933 there were registered trucks not over one ton, 8857, which increased in 1934 to 10,046, and [fol. 291] 1935 to 12,567 and 1936 to 14,243. There was a gradual increase in practically every rating capacity for all those years. The vehicles in 1925, the registered passenger automobiles was 153,978. They gradually increased, except in 1932 where it dropped down, and in 1936 it was 218,690. For trucks in 1925, it was 15,409 which in 1936 had increased to 30,492.

Judge Parker: All sized trucks?

Mr. Griffith: That is all sized trucks.

Q. Now, Mr. Bohlen, what class of trucks are used, particularly by carrier for hire, if you know?

A. Two to three tons, that is, on your semi-trailer combination outfits.

Q. I wish you would read the registration of those types of trucks for 1933 to 1936?

A. 1933 there were 522; 1934—764; 1935—1580; 1936—2306.

Q. Has any other type of truck increased in proportion?

A. No, sir.

Q. Do you have the weights of buses registered in this State?

A. I have some records here that I brought down from the Highway Department which shows the registration of the Greyhound buses.

Q. What do those buses show with respect to the weight of the vehicles?

A. We have one here. The bus was first registered in 1936, 17,500 pounds; another one registered in 1936, 17,500 pounds, and another one in 1936, 17,500 pounds. One in 1934, 18,500 pounds; one in 1933, 16,900 pounds; another one in 1933, 16,900, and one in 1934, 18,000 pounds. That is all I have.

Q. So far as you know are those as heavy buses as you have registered in the State?

A. Yes, sir.

Q. What is the width of those buses?

A. They run 96 inches, the majority of them, I would say.

[fol. 292] Cross-examination.

By Mr. Funkhouser:

Q. Mr. Bohlen, those weights you gave for buses were the weight when the buses were empty?

A. Yes, sir.

By Mr. Griffith:

Q. What is the maximum carrying capacity of those buses to the bus?

A. From 30 to 31 passengers.

Q. So at an average weight per passenger of 150 pounds would mean about 4500 pounds if loaded to capacity.
A. Yes, sir.
Q. What are the limits as to baggage, do you know?
A. No, sir, I might explain that in registering passenger cars, we go by the weight of the passenger car. We don't take into consideration the passengers. In registering trucks, of course, we go by the load.

By Mr. Funkhouser:

Q. If the weights you have given for a bus is empty, a loaded or gross weight is over 20,000 pounds?
A. Yes, sir.

By Mr. Blease:

Q. It depends on how many passengers it has?
A. I am going by the maximum figure.

W. W. Goodman, a witness for the defendants, after having been duly sworn, testified:

Direct examination.

By Mr. Griffith:

I am employed by the Public Service Commission of this State as Director of the Motor Transport Division. We keep record of the registration of trucks for hire. I have made a tabulation of them. The total number of *ev*hicles engaged in common carrying is 111.

Judge Northcott: For what year is that?
[fol. 293] A. For the current period. There are 1202 vehicles registered as contract carriers.

Mr. Griffith: Defendant offers in evidence the tabulation referred to by the witness Goodman, and same is received and marked "Defendant's Exhibit 15". (Tabulation showing 111 vehicles.)

By Mr. Funkhouser:

Q. Is that interstate and intrastate carriers?
A. Yes, sir.

By Mr. Griffith:

Q. That includes all of your registered carriers?
A. Yes, sir.

Judge Parker: How many were there?
A. 1202, compared with 111 common carriers.

Mr. Griffith: Defendant offers in evidence the tabulation showing a total of 1202 and same is received and marked "Defendant's Exhibit 16".

Cross-examination.

By Mr. Funkhouser:

I cannot state how many interstate carriers who have filed applications for public convenience and necessity with the Interstate Commerce Commission have filed them with us. There is about 1600 of all motor vehicle carriers, both common and contract, passenger and others. In other words, there are 1600 of those that would come under the jurisdiction of the Interstate Commerce Commission. I don't have the figures as to how many from within the State of South Carolina. It is true the Interstate Commerce Commission construes the term common carrier differ-ntly from what our Commission construes it in South Carolina. The irregular route common carrier as defined under the Federal Motor Carrier Act is the contract under the South Carolina law generally. That is the only difference.

[fol. 294] CLIFFORD OLDER, a witness for the defendants, after first being duly sworn, testified as follows:

Direct examination.

By Mr. Griffith:

Q. Mr. Older, are you the Clifford Older who was referred to in the testimony yesterday?

A. I presume so. I know of no other person by that name. My present home is in Willomet, Illinois, a suburb of Chicago. The first formula that I know of that was proposed for the design of concrete roads was one that I believe I advanced. However, it was merely an adapt-ion of well known engineering formulae to the particular pur-

pose. For the first time, I believe, I proposed that formula used in the design of concrete pavement. The Older formula referred to yesterday was the formula that was prepared by me and so far as I know it was the first one that was proposed. I graduated from the University of Wisconsin, College of Engineering, with a degree of Bachelor of Science in Civil Engineering in the year 1900; for six years after that, until 1906, I was employed by a number of different railroads in various capacities. From 1906 to 1924 I was an employee of the Illinois Highway Department. From 1917 to 1924 in that period I was Chief State Highway Engineer; from 1924 to the present date I have been in consulting practice; part of the time in cooperation with certain definite associates; for the last three years without any associates in business or in the consulting profession. I conducted the highway test known as the Bates test. The Bates test included a series of sections of highway laid on a road in a location where no traffic could use the location and consisted of 67 sections of highway, each of different construction in one way or another, the total length being about two and a half miles. The plan of the road was to test not only different types of paving construction, but different thicknesses, to test every element that entered into the strength of carrying capacity of the various sections of pavement. I might illustrate in one way, how the attempt was made to determine the load limitations of these various sections, by referring first to [fol. 295] the concrete sections.

We began the series of concrete sections with a section four inches thick, a uniform thickness of four inches. The next section along the road was five inches thick, and then with spaces of one inch, the succeeding sections were increased until a maximum of nine inches was reached. In other types of road, such as were called flexible types, meaning by that a gravel or stone base without any cement in it, over which was laid some kind of varying surface, we had a similar series of sections. We made steps in thicknesses and so on through the various so-called brick types and asphalt types or concrete-asphalt surfaces, on these flexible bases. The final plan was to begin operating over this test highway a fleet of trucks, beginning with trucks of the lightest weights that we could get or that we

have available, and operating them along one side of the road and back the other, noting very carefully what happened to these various sections. Then stepping up the load of the trucks, particularly on the rear axle, operating them again for a particular number of times and again noting and observing the behavior of each of these various sections, and so on, stepping the load up by multiples of 1000 pounds in general until we reached the legal limit that was then in force in Illinois, which was 16,000 pounds an axle, and when we reached that limit, we ran the trucks many more times because that was the consideration of design that we were looking for, and we stepped them up beyond the legal limit.

Prior to the traffic test, I might say that we carried on innumerable individual tests with loads, that is, the application of a load at corners and centers and various other places throughout the slab, and observing, as one would in a laboratory, the behavior of the materials, in an endeavor to determine the laws, the natural or fundamental laws governing the behavior of the road. The truck traffic test, as a matter of fact, was to test or prove whether or not any theory might be developed from a scientific investigation as regards producing a formula for design. If I were [fol. 296] called upon to build a highway today the first thing I would want to know would be whether there was any limitation of funds. If I were going to apply my formula and make up a formula today for the building of a certain highway or road the first thing I would want to know would be the load limitation. Without knowing the load limitation the formula is valueless, as far as I know. I mean by my formula that I would try to adopt a plan by which a person wanting to know how to build a certain strength road, they could apply their formula and get it. With the experience I have had in engineering, I could not tell the strength of a road by looking at it. There are so many factors that you cannot see by merely traveling over a road, or even getting out of your car and examining it, even if you know how thick it is, how wide it is, and the various other matters that you can see before your eyes; for example, by merely looking at it you know nothing whatever of the strength of the concrete, if it is a concrete pavement. There is most decidedly a difference in the strength of concrete pavements.

Judge Glenn: Regardless of the thickness, the same thickness, in concrete, there is a different strength in it?

A. Yes, sir.

Judge Glenn: Does that vary considerably?

A. Yes, sir.

By Mr. Griffith:

Q. What else would you want to know?

A. I would want to know a good deal about the type of the soil on which the pavement was to be laid.

Judge Glenn: We take for granted this gentleman has had a whole lot of experience. How about bringing him down to our roads down here?

By Mr. Griffith:

Q. You cannot give an opinion on a road by just looking at it?

A. I could not give an opinion that would not be modified between limits of perhaps considerable spread.

Q. Is it a fact that any opinion has got to be varied to a certain extent?

[fol. 297] A. I am certain that mine would have to be.

Q. Let me ask you this question. What do you mean by how much a road can bear?

A. A matter of judgment aided by formula. That won't apply to the average conditions as you know it and presume that may occur in this location. You may arrive at a figure that you could consider is a fair one under the circumstances as known to you.

Q. What percentage of the ultimate strength do you consider is the proper basis?

A. Something under 50%, of the ultimate strength.

Q. Now, if a concrete road is used for weights under 50%, how long will they last?

A. As far as the engineering profession knows, I believe it would last indefinitely until it becomes obsolete.

Q. I will ask you this question in that connection. Do roads which are subjected to heavier loads than they should have deteriorate at once or gradually?

A. The deterioration that may come from an overload—by overload I mean a load that produces a stress in the pavement slab in excess of 50% of the ultimate stress—it may

be very slow or very rapid, depending upon the amount that this 50% of the ultimate strength is exceeded—I might illustrate that in this way: If that ultimate stress—I mean if the stress caused by the load is 90%, we will say of the ultimate stress—the failure may appear almost immediately, perhaps a few days after the road is opened to traffic. It simply depends upon how many loads that produce that ultimate stress have to go over it each day, not ultimate stress, but 90% stress that goes over it each day. Now, if the loads that use the highway cause a stress of 80% of the ultimate, it may be a week or ten days before anything would show up, and that daily increases. As the load stress approaches to somewhat higher than 50% for example, 54% or 55%, it might not cause any visible signs of distress for a number of years. It might be possible that the road is not a heavily traveled road, and the number of vehicles that travel it are [fol. 298] few and the failure is never reached until the road becomes obsolete; it would not fail, but it does not take very much more than 50% of the ultimate, say 60%, when the loads break the road in a comparatively short time. This is based upon well known laws on the behavior of structu-al material. So, when the deterioration as you speak of takes place, I can't say. There may be signs of visible deterioration right away. There may be no visible deterioration. It may be delayed for any period, from a few years to perhaps 10 years, or even more.

Q. But destruction begins before the least sign of destruction is seen?

A. After it occurs, however, it is likely to be very rapid from that time on.

In so far as I know, if a road is not subjected to a greater weight than around 49% of its ultimate strength it would probably last forever, in so far as carrying loads, but not the natural agencies of destruction and obsolescence. I have had a considerable number of proper illustrations of that in my experience. The strength of concrete varies. The same concrete constructed in as nearly the same manner as we know how to make it will still vary in strength. There is also a variation in the strength of the subgrade and foundation. It varies in different parts of the state, and even in the same territory approximately. It varies sometimes at very short intervals along the particular piece of road. It is due to such variations as those I have mentioned that I

say that an opinion as to what a road can carry has got to be flexible.

Q. Relating to the width of a vehicle, does that have any relation to the damage to the road?

A. Yes, the width of the vehicle is inter-related with the strength of the pavement, the only thing, the load must have an influence. I explain that this way. Presume a 20 feet wide pavement which is called a two-way pavement, in that case two vehicles 96 inches wide can pass with a certain clearance, and the outer wheel of the two vehicles will not be required to travel immediately over the edge of the pavement on the shoulder off the pavement, as where it is 16 feet wide. The width of the vehicles in this case forces each vehicle in passing, in order to obtain clearance, to either [fol. 299] travel the wheels on the extreme edge of the pavement or perhaps on the shoulder, running off on that. Now, if the edge strength of the road is not balanced with the middle portion, or if the edge is not thickened sufficiently for that condition, then the width of the vehicle has a very important bearing upon how soon one might expect destruction of the edges of the pavement, on the roads that have the same center thickness and the same edge thickness.

Q. You have heard the testimony of Mr. Williamson, our Highway Engineer, would you give us your opinion as to the weights the concrete roads in this state should bear?

A. As I understood Mr. Williamson, as I heard Mr. Williamson's testimony, the concrete pavements, were in general of three different widths, that is, 16, 18, and 20 feet, and of two different thicknesses generally speaking. For example, some of them have an eight inch thickness at the edges, and a six and a half inch thickness at the center. I understand from his description that this extra thickness at the edge was tapered gradually down to the six and a half inch thickness at the center. Another series was seven and a half inches thick at the edge and six inches at the center, and tapering in the same way.

I think it is quite obvious that disregarding width, these differences in thickness along, assuming that the concrete is of the same strength in all cases, would mean that the thinner roads would not be able to carry the same wheel load as the thicker ones. The load carrying capacity of the concrete pavement is not only dependent upon the thickness

of the concrete, the strength of the concrete and the character of the sub-grade, but it is also dependent, to a very marked degree upon other factors in the pavement bases. For example, pavements have transfer joints to provide contraction and expansion at intervals. A pavement may or may not have a longitudinal joint or a joint running down the center of the road, so there is a further modification. Mr. Williamson's testimony indicated that part of [fol. 300] this pavement did not have longitudinal joints. For example, that part of the concrete pavement—without repeating that, I am talking altogether about concrete pavements for the time being. The concrete pavements having no longitudinal joints having a thickness of six and a half inches at the center and seven and a half inches at the edges are the weakest pavements of the lot, the reason being that in my, I will say 30 years experience in highway matters, during nearly all of which period I have been in touch with concrete pavements, it is a matter of common observation that if there is not a center longitudinal joint built into the pavement, nature will put a longitudinal crack in it. Now, when this crack comes it will separate a certain amount, due to contraction during low temperature periods. Then at the interior portion of the pavement we have an edge that is only six and a half inches thick that is exposed to the wheels of traffic. The outer edge has been strengthened to perhaps carry a heavier load, but here is an inner edge that is a weak link in those pavements. For those pavements I would be forced to give an opinion of a load that is quite low. In my judgment those pavements are not capable of supporting indefinitely wheel loads in excess of about forty or forty-two thousand pounds, subject to these various conditions we have spoken of.

Judge Parker: You say forty-two thousand pounds?

A. Forty-two hundred pounds—pardon me, making axle loads in the neighborhood of eighty-four hundred pounds. On pavements having an eight inch thickness, on the other hand, and seven and one-half mid portion and transverse joints, I would place the load limits in the neighborhood of 6400 pounds per wheel, or about 12,800 pounds per axle approximately. It might be subject to a variation of perhaps 500 to 1000 pounds per wheel, due to these various causes either way. That is the actual load supporting capacity.

Judge Parker: Is that the best type pavement we have been testifying about you are talking about now?

A. Yes, sir.

[fol. 301] Q. That is an axle load of about 12,500 pounds?

A. Yes, sir.

Judge Parker: Now, if I may interrupt you, I would like to ask you this question. What do you say as to the maximum axle load of 18,000 pounds in so many states? Is that an excessive load in those states?

A. I would say in all probability that it is. May I elaborate a little, please?

Judge Parker: Yes.

A. In the State of Illinois while I was responsible for the construction of the pavement, I spent one hundred million dollars of the peoples' money. In the law was written a 16,000 pound axle load—8,000 pound wheel load. I was responsible for building approximately one hundred million dollars worth of pavements.

It is a matter of extreme regret to me that I have seen many of those pavements fail—the concrete failed. They have been destroyed by the travel, and the necessity has arisen for the replacement of those pavements. Now the law provided for this axle load of 16,000 pounds, and a police force—a highway police force—was employed by the State not only to look after load limitations, but accidents on the highways, and to serve generally.

Some of those pavements, some considerable mileage of those pavements, in the neighborhood of six or seven hundred miles, had thicknesses approximately the same as this 7½-6 inch pavement described here. I have seen them go to pieces and require replacement. Some of them are still in use after a service of about fifteen years. Many miles of them are gone. That is one reason why I want to be conservative, and yet not ultra-conservative in estimating the life of a pavement, because I feel if I fail once I can fail again.

By Mr. Griffith:

Q. From a description of the bridges which Mr. Williamson designated "weak bridges", isn't your opinion that they would be helped by spacing the weight of a truck on sev-

[fol. 302] eral axles?

A. Mr. Williamson described, as I recall it, quite a number of bridges. They would not behave exactly alike under these conditions.

Q. With a bridge with a span the length of 200 feet, would it make any difference how much the gross weight was spaced with axles?

A. The spacing of the axles—I will have to first assume that this bridge of 200 feet length is a single span reaching from abutment to another, or an abutment to a sill, and so forth, 200 feet long. Now, the spacing of the axles would have an important bearing on parts of the bridge, but not the whole of the bridge. It would have an important bearing upon the floor—which may be likened to the sills or joists under the floor resting upon a beam in the cellar to another beam in the cellar, because that is the way it is supported. The spacing of the axle would have an important bearing on support, on the stresses produced in such stringers. It also has some bearing upon the stresses caused in the beams that support the stringers. There would be very little, if any, effect on the cross members as a whole, although usually at least four, sometimes more, suspenders of the bridge would be so affected. The destruction of the bridge as a whole, the falling of it entirely under such a load would be affected very little, if any. Practically none, I would say.

Q. I believe it has been testified to here that there is no formula to test the strength of any road except a concrete road. Do you agree with that?

A. I do.

Q. You know of no method of testing such roads as these bituminous surfaces?

A. No.

Q. You then have depended entirely on just common sense knowledge and observation?

A. That is correct.

[fol. 303] Q. Well, do you know whether or not they are designed for heavy traffic?

A. The earth types described by Mr. Williamson, I would say that they are not designed, or at least that they are not suited for heavy traffic.

Q. What is your judgment as to the weight that such roads should be subjected to?

A. With the person responsible in such case, I would sure see in order not to encourage excessive maintenance

and reconstruction that the road should be confined practically to that of the average passenger car or truck of equivalent weight and tire equipment.

Q. Well now, how about the dirt type of road?

A. The same thing would hold true. Of course there are cases on certain, particularly clay soils or soils of that nature when the surface material might support almost any load without any serious detriment, as far as weight is concerned. Subsequently comes a wet period and it won't support any load without serious cutting up and destruction of the surface, and the amount of the destruction, in my experience and judgment, depends upon the weight of the vehicle to a large extent.

Q. Would axles help you very much—distribution of weight by axles?

A. Not very much.

Q. You think that the weight of a vehicle has a direct relation to its danger or safety?

A. Yes, sir, I do. The heavier the vehicle the more destruction it is capable of causing if it is in an accident. It is true, in so far as I know, that with equal braking facilities, mechanical devices, the heaviest truck on the highway or the heaviest bus might stop in just as short distance as the lightest passenger car, both equipped with the same proper brakes. Theoretically they should stop in the same distance, coming down from an equal speed, but if either of these vehicles, or we will say both of them strike an object at the same speed, presuming they have their brakes on but are still moving, the damage done by the [fol. 304] heavier vehicle will be in proportion to its weight as compared with the light vehicle.

I might illustrate it by say, suppose we have in our hand a tennis ball and a stone, both of the same size but of different weights. We throw the ball and the stone up against the window, and when they reach the window they are both traveling at the same rate of speed. The stone would undoubtedly crash through the window—the tennis ball would have no effect on the window.

Personally I always like to give those illustrations that I can grasp very readily myself.

The same thing applies in the case of the heavier vehicle, and the light vehicle on the highway. In the City of Chicago, for example, it is almost an every day occurrence

that a passenger car rams the street car. Ordinarily the passenger car suffers seriously. Perhaps the driver suffers seriously, depending on his speed and circumstances. The passengers in the street car are practically unhurt. Less often a truck or a bus rams a street car. We can't say that any two of them are going at the same rate of speed, but we know by observation that the truck collision, on the average, with the street car not only endangers the truck driver but very frequently injures or even kills occupants of the street car, merely due to this momentum that must be suddenly stopped, in the one case very great and in the other comparatively small. Therefore, I feel the weight of the vehicle has a very important bearing upon accidents, attributable to highway accidents in general.

Q. How about the length of a vehicle?

A. The length of a vehicle, as I see it, is a matter of passing. Obviously it requires a greater length of time for one vehicle to overtake a long vehicle, to get past it and in the clear than if the passed vehicle is relatively short. That, I think, has been advanced previously in testimony. I agree with it.

Q. In that connection do you think the width of a vehicle has anything to do with the difficulty as to the length of [fol. 305] time in passing it?

A. Very much so. I will illustrate it in this way. Supposing I am traveling in a car along the highway. I find that I wish to pass a slower moving vehicle ahead of me. Circumstances are such that I can't swerve out into the opposite lane of traffic to see what is in that opposite lane of traffic. Perhaps there is a curve ahead, or other cars coming. Numerous circumstances might cause that until I have approached the slower moving car as closely as I think it is safe to do so, and still have plenty of room to swerve out to get by and past.

In that position a narrow car in front of you—you are sitting in the driver's seat. From your eyes past the edge of the car on the left, the angle that your vision makes with the center line of the opposing traffic lane will extend much further down the highway than in case the vehicle is wider; your angle of vision is then cut down at a much shorter distance.

Q. Is it cut off in proportion to the width?

A. Quite rapidly.

Judge Glenn: In other words, six inches difference would make a great difference?

A. That is true.

By Mr. Griffith:

Q. So, you would say all these factors have a direct relation to the safety on the highway?

A. I would.

Q. Would you say they have a direct relation to the congestion on the highway.

A. Yes. After hearing Mr. Williamson testify I think the gross load limitation in this State of 20,000 pounds is decidedly generous. I agree with the gentleman from the Bureau of Roads that in so far as the highway safety itself is concerned, axle or wheel load determines the amount that should be allowed. That is on concrete roads and it is more or less true also on the bituminous roads. It is not true so much so on dirt roads.

[fol. 306] Q. I ask you if in your opinion a load limit of 20,000 pounds has any relation to the preservation and protection of the highway?

A. I believe that it does.

Q. Would it be possible under a 20,000 pound gross weight limitation to get an excessively high actual limit?

A. Excessive with regard to the pavements of South Carolina?

Q. Yes, sir.

A. Yes, sir; it would.

Q. Assume the commercial vehicles that have been testified here, the haulers for hire, have three axles. Would you say under those circumstances that the excessive axle load would be infrequent?

A. Yes, very infrequent, in my judgment.

The 20,000 pound gross weight would limit reasonably the axles on a three-axle truck, as such trucks are ordinarily designed the axle load in that case would be down to quite reasonable limits, with respect to the carrying capacity of the roadways of the State.

I said in the beginning that when I started out to building highways, the first thing I wanted to know was the traffic that would go over it. That is the reason I developed my formula. In my experience as an engineer in the years past, working for the State of Illinois, I have never con-

templated that the roads of this country would be subjected to the burdens that are now being imposed on them by heavy trucks. It is a difficult matter to enforce the highway laws. The axle load limits would be and is harder to enforce than a gross load, because especial equipment is necessary in the hands of the enforcing officers in order to weigh axle loads. Gross loads may normally be weighed at existing scales that may have been checked.

Mr. Griffith: The witness is with you.

Cross-examination.

By Mr. Funkhouser:

Q. Mr. Older, when did you last design a road?
A. Including city streets—city pavements?
Q. No, sir. I am talking about highways.
A. I think about 1932.
[fol. 307] *A.* I believe approximately that date.
Q. And did you design that road without considering axle weights?
A. No, sir.
Q. Didn't you make the statement a moment ago that it wasn't necessary to consider axle weights in designing a highway?
A. I think not.
Q. I understood you to say it was the gross load and not the axle weight that counted in the highway.
A. I am sorry but I didn't make any such statement, as I recall.

Judge Parker: I understood him to say the test was easier to apply—the law was easier to enforce on gross load than axle load.

By Mr. Funkhouser:

Q. Well, now let's take that up for a moment. Isn't it a fact the axle weight is easier to enforce than the gross weight laws?
A. Not in my opinion and experience.
Q. Then you disagree with the American Association of State Highway Officials? I would like to read to you page 9 of this pamphlet, which is generally known in highway circles, entitled "Who Shall Use the Highways and How:"

'Highway stresses are ruled by wheel loads and not by gross loads. Those who really seek the protection of the highways should help to impress that fact indelibly upon the minds of legislators and law enforcement officers. For it so happens, that the wheel load is not only the more critical factor but is also the more easily determinable factor. To measure gross loads, stationary platform scales are a practical necessity; and, unless they are placed and actually operated on at least all important roads, the gross load limitation, whatever it may be, will be a virtual dead letter. The wheel load limitation is, on the other hand, easily enforceable by officers, equipped with small, portable scales, who appearing suddenly, first on one road, then on another, may plant their telltale instrument by the roadside and require any driver to run his heaviest wheel on it, and so, quickly and practically, detect the law violators. And of this at [fol. 308] least there can be no question: That for the protection of the roads an enforced wheel load limitation is immeasurably better than an unenforceable gross load limitation.''

Do you agree with that?

A. I certainly don't. I have had experience in the law enforcement—I haven't said it—but for a part of the time I was State Highway Engineer I had the direction of the Highway police of the State, and we tried both methods.

Q. Do you know of the American Association of Highway Officials.

A. I do.

Q. Isn't that about the most scientific and learned association of highway officials in America?

A. I would say so.

Q. But you do disagree with them?

A. Yes, sir.

I have been in consulting practice since 1924. Prior to the last three years I have been connected with the firm of Cosoer, Older & Quinlan, an engineering organization. For the last three years I have been offering—or acting as consultant whenever called upon to do so—whenever I decided to accept the assignment. In recent years I have done considerable appearing before various bodies and testifying. I believe I appeared before the North Carolina Legislature in 1933 when there was a bill similar to the present law in South Carolina introduced in North Carolina.

Q. And there you urged the Legislature to reduce their weights and size to the present law of South Carolina, did you not?

A. I don't remember the exact figures that were used at that time.

I appeared on behalf of the railroads and have appeared before other legislative bodies on behalf of the railroads; the Legislature of Missouri at one time, or rather a legislative committee; Kansas at one time; Illinois, Georgia—that is all I recall. I did not appear in Tennessee, or Kentucky or Alabama, not before the legislative committee. I never appeared at all in Alabama, never in Tennessee that I recall. I never appeared before any legislative committee in Kentucky, although I recall giving a deposition that was used in [fol. 309] Kentucky. I persume it was used before the Legislature. That is part of the kind of consulting practice I have been in in recent years. It is not true that I have been part of my time a railroad lobbyist.

The test road construction was started in 1920, finished in 1931, and the test went along, these traffic tests went on through 1922 and 1923.

Q. Why didn't you tell this Court when you were testifying a moment ago and giving the results of that test that the conditions were entirely different from today, and that you used a solid tire in that day?

A. It didn't occur to me. I am perfectly willing to add that testimony. The solid tires were used on the trucks.

Q. And 1922 was fourteen years ago, wasn't it?

A. Yes, sir.

Q. Isn't it a fact that great advances have been made in the mixing of concrete and in the building of roads in the last fourteen years?

A. Well, the word "great" is rather an indefinite term. Advances have been made, yes, sir.

Q. Isn't it a fact also that great advances have been made in the building of automobiles scientifically, and from an engineering standpoint and in the distribution of the loads of those automobiles?

A. I don't know a great deal about the building or construction of automobiles.

Q. So you don't know whether the distribution of loads have made—the science of distributing loads has made any progress in recent years?

A. I don't know that. I am entirely ignorant of that fact.

Q. How can you tell this Court that any tests you made fourteen years ago, with the changes in the mixing of concrete and the building of roads and building of automobiles would be comparable to any conditions today?

A. Because fundamental laws do not change with time.

Q. I believe you said you built one hundred million dol- [fol. 310] lars worth of roads in Illinois. Is that true?

A. Approximately that amount.

Q. And I believe you said you had been distressed, or something to that effect, to notice those roads wear out. Is that true?

A. Yes, sir; part of them—not all.

Q. Were those the same roads you built?

A. Part of them, yes, sir.

Q. And what weight limits did you allow on those roads at the time you built them?

A. I tried to design them for a 16,000 pound axle load, to the best I knew how.

Q. And did Illinois allow a 16,000 pound axle load?

A. Yes, sir.

Q. What does Illinois allow today?

A. 16,000 axle load, so far as I know.

Q. It has never changed it, has it?

(No answer.)

Q. Did you appear before the Legislature of Illinois?

A. Yes, sir.

Q. And didn't you try to get them to lower the axle load?

A. Yes, sir.

Q. And they refused to do it?

A. Yes, sir.

Q. Now, I believe you said that when a concrete road is properly built it lasts forever, didn't you?

A. Not exactly.

Q. Please state what you said.

A. I said if the road was so built that the loads that came upon it did not stress the concrete in excess of its endurance limit, that in so far as I know the loads would not destroy it, no matter how many times they used it. That may not be the exact language, of course, but that is the intent.

Q. Have you made any study of the climatic conditions of South Carolina as to its roads?

A. Not any special study, no sir.

[fol. 311] Q. Have you made any study of the soils and subgrades of the various main highways of this State?

A. No sir.

Q. Have you made any study of the workmanship of the building of the highways in this State?

A. No sir.

Q. Have you made any study as to the mixture of the concrete?

A. No sir.

Q. Do you know what kind of cement and what proportion of cement is put to sand on the highway?

A. I don't know.

Q. Do you know anything about the joints to which you testified, about the highways of South Carolina?

A. I do, as described to me individually by Mr. Williamson.

Q. I don't want your hearsay. I want your own knowledge.

A. As one engineer to another I would say I knew it, because I believe it.

Q. Have you observed the joints in the highways.

A. No sir.

Q. Does a high pressure pneumatic tire and low pressure pneumatic tire make any difference in the stresses on a road?

A. A very moderate amount on concrete pavements, in accordance with my way of figuring.

Q. Why is it then the Bureau of Roads, which has distributed about two billion dollars to the highways of this Nation, makes a distinction in axle load that can be carried when they have low pressure and high pressure tires?

A. I can't answer for the Bureau.

Q. Can you answer for yourself why would that distinction be made?

A. Why should the Bureau make that distinction?

Q. No. You said it wouldn't make much difference, and you say you can't answer for the Bureau. I am asking your opinion as an expert why would anyone, on what theory or what philos-phy could anyone reason that way?

A. Well now, the effect from a theoretical point of view [fol. 312] varies depending upon the type of pavement you are dealing with. On the concrete pavements, in accordance with the method of design they usually use, it would not

make any difference. The gross load would produce the result.

I do not claim that the method I use produces an exact mathematical result. I do believe that it produces a closely approximate result, the correctness of which is closely approximate to the correct result. Now there are other formulas in existence. The one, so far as I know, the Bureau of Public Roads relies upon to a considerable extent, is called the "Westergard Formula", which was mentioned here. That formula, when used, produces decidedly differ-nt results, depending upon the tire equipment, particularly pneumatic tires, as distinguished between low pressure and high pressure. In one place the area of contact of the tire with the pavement is small, as compared with the other. Now I reserve the right to myself to differ with the Bureau on the application of the formula.

Q. That formula of which you are the father—I believe you stated it was your child—was intended to have roads built taking into consideration axle weights and not gross loads, wasn't it?

A. Yes, sir.

Q. Then what has made you change your opinion and get away from the test of axle load to gross load?

A. I haven't, so far as the design of the pavement is concerned.

Q. I believe you drew some reference or made some comparison a moment ago about the difference between a ball and a stone throwing it against something, did you not?

A. I did.

Q. Is the difference between a bal-oon tire and a solid tire just about the same difference as between a ball and a stone?

A. In effect on the highway surface, no.

Judge Parker: Isn't there this difference between the two tires, that the l w pressure tire contacts the pavement over a wider area?

[fol. 313] A. Yes, sir.

Q. And the pressure of the weight of a truck touches the pavement in an area three or four times as great as under a high pressure tire. Is that right?

A. Your Honor, I do not recall the relative area. Its is my recollection that the difference between the area contacted by the high pressure tire and the low pressure tire

for the same type vehicle, is not as great as two or three times, although I would not say I was not mistaken, as the area might be——

Judge Parker: Of course if the area of contact was twice as great, the pressure on the particular part of the road contacted would be half as much?

A. The unit pressure would be half as much, but in the design of the concrete road it is not the unit pressure on the surface of the pavement that has much effect on the behavior of the pavement. It has some effect but it is not in proportion to that unit pressure, by any means.

Judge Parker: I don't know that I get you.

A. Supposing we have a long beam and we place a load concentrated right in the center of an inch of length of the beam. We take the same load and spread it over two inches. It doesn't make very much difference in the breaking strength of that beam.

Judge Parker: The tension extends beyond the point of contact?

A. Yes. Of course there is a theoretical complication there, but the illustration I think holds good. There comes a time if you spread it over near the end of the beam it would have a decided effect, but a small variation near the middle doesn't much affect it.

Q. When did they pass the prohibition in Illinois against the use of solid tires?

A. That was after I left the State Highway Department and I haven't these dates.

Q. And the whole time you were there and you deprecated the wearing out of the roads, solid tires were used on [fol. 314] those roads the whole time?

A. The whole time I was with the Highway Department solid tires were used yes, but I want to modify that by saying I observed the destructive effect just the same after the pneumatic tires came into use, and the solids have been prohibited during the last——

Q. Wouldn't you think from your former testimony that because of the former tires the limit of elasticity had been stretched in those roads by the use of the solid tires and their deterioration naturally would follow later?

A. I think that is an extremely remote possibility; so remote that I would say in my judgment it is clear out of the question.

Q. I believe you heard Mr. Williamson's testimony today, didn't you?

A. Yes, sir.

Q. And you heard him state that these main thoroughfares would carry axle weights of 18,000 pounds?

A. Yes, I heard his testimony.

Q. In his testimony you have disagreed with him?

A. Yes, sir.

Q. And you still disagree with Mr. Williamson?

A. Yes.

Q. You realize, of course, he is the gentleman in charge —he is the chief engineer of this Highway Department, isn't he?

A. Yes, sir.

Mr. Funkhouser: That is all.

Mr. Griffith: That is all.

Mr. Griffith: May it please the Court, we would like to call to the Court's attention and ask them to take judicial notice of the Act of the Legislature authorizing the investigation which resulted in this report already offered in evidence.

Judge Parker: All right. We will take judicial nptice of [fol. 315] that. You call it to our attention so we will know where to find it.

Mr. Griffith: If your Honor please, I am doubtful of another thing. There has been quite a bit of stress laid upon the width of vehicles in this Act. The former law, I presume, would be repealed by the passage of this Act. I want to ask the Court to take judicial notice of the law as it existed in 1932 in the Code, prior to the passage of this Act, and I desire to call attention at this time that the width was not changed—the width of *the width of* the vehicle.

Judge Parker: The 1932 Act was 90 inches was it?

Mr. Griffith: The law prior to the adoption of the 1932 Act was 90 inches width. There was no change in that. I am asking the Court to take judicial notice of all motor vehicle laws contained in the 1932 code, although they are being repealed by this Act.

Judge Parker: Well, we do that. We will consider any Act of South Carolina you call our attention to.

Judge Northcott: Do you mean, Mr. Griffith, the width permitted under the law of South Carolina has never been greater than 90 inches?

Mr. Griffith: That is right, since there has been any regulation.

Judge Northcott: What was the old law in regard to gross weight?

Mr. Griffith: Your Honor, off-hand I wouldn't be definite about it, but those trucks of the type which you are investigating here I think that would be limited to 10,000 pounds actual load.

Judge Northcott: Pay load?

Mr. Griffith: 10,000 pounds axle load and 40,000 pounds gross load.

Judge Northcott: What do you mean "actual load"?

Mr. Griffith: Axle load.

[fol. 316] Judge Northcott: I thought you said "actual".

Mr. Griffith: No; axle load.

Judge Parker: I asked a question about that the other day and somebody told me the in-tial legislation was 20,000 pounds and never had been 40,000 pounds. When the State Engineer was on the stand this morning I addressed an inquiry to him as to why they reduced the load allowed and somebody said that and I got the impression, at least, that this was the initial limitation; there had been no change made with respect to it.

Are there any other witnesses for the defendant?

Mr. Griffith: I believe not.

[fol. 317] PLAINTIFFS' EXHIBIT No. 2

United States Department of Agriculture, Bureau of Public Roads,

Washington, D. C.

November 28, 1936.

Payments to all States, District of Columbia, and the Territory of Hawaii from Appropriations Available to the Bureau of Public Roads

Fiscal Years 1918-1937 (July 1-October 31, 1936)
$2,197,634,970.13

[fol. 318] PLAINTIFF'S EXHIBIT No. 3

November 28, 1936.

Payments to State of South Carolina from Appropriations Available to the Bureau of Public Roads, by Fiscal Years

Fiscal Year	Total Payments
1918	$7,807.68
1919	60,593.98
1920	301,974.74
1921	876,823.16
1922	1,431,877.23
1923	1,363,450.11
1924	1,173,907.44
1925	1,220,841.20
1926	1,810,458.38
1927	1,187,023.41
1928	1,259,902.48
1929	816,484.11
1930	926,038.22
1931	3,306,421.66
1932	1,898,294.20
1933	2,151,541.73
1934	2,348,434.02
1935	3,742,636.16
1936	2,433,242.61
1937 (July 1 to Oct. 31, 1936)	1,423,385.11
Total	$29,741,137.63

[fol. 319] PLAINTIFFS' EXHIBIT No. 4

Mileage of Highway and Grade Crossing Projects in South Carolina Improved With Funds Available to the Bureau of Public Roads as of October 31, 1936

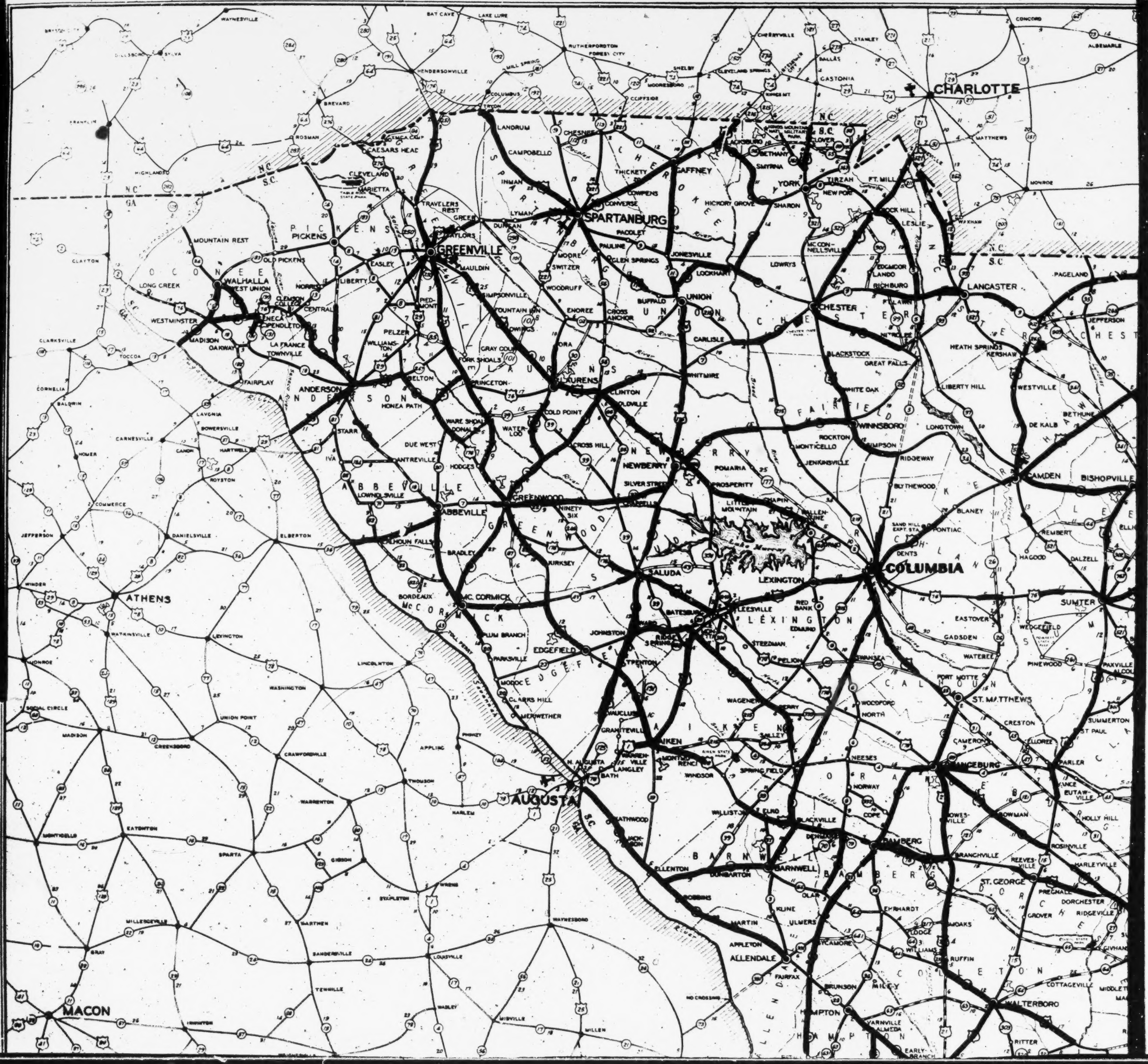
Graded and Drained	84.9
Sand-clay, Untreated	861.0
Sand-clay, Treated	624.4
Gravel, Untreated	100.7
Gravel, Treated	97.4
Low-cost Bituminous Mix	10.0
Bituminous Macadam	3.3
Bituminous Concrete	193.5
Portland Cement Concrete	795.8
Bridges and approaches	26.4
Railroad-Highway Grade Separation	0.4*
	2,797.8

* Involves the elimination of 18 grade crossings and the protection by signal devices of 18 grade crossings.

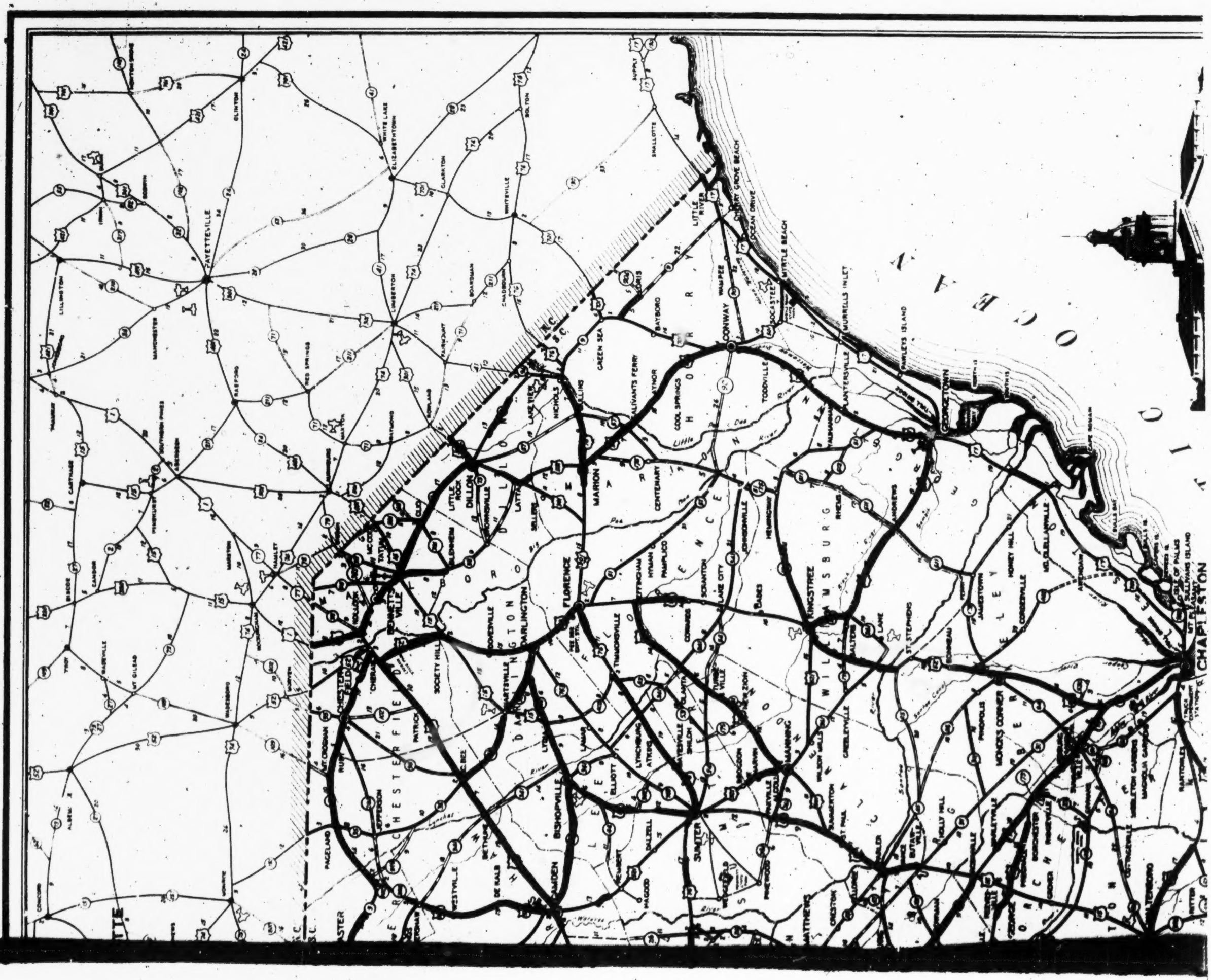
DEFENDANTS' EXHIBIT No. 7

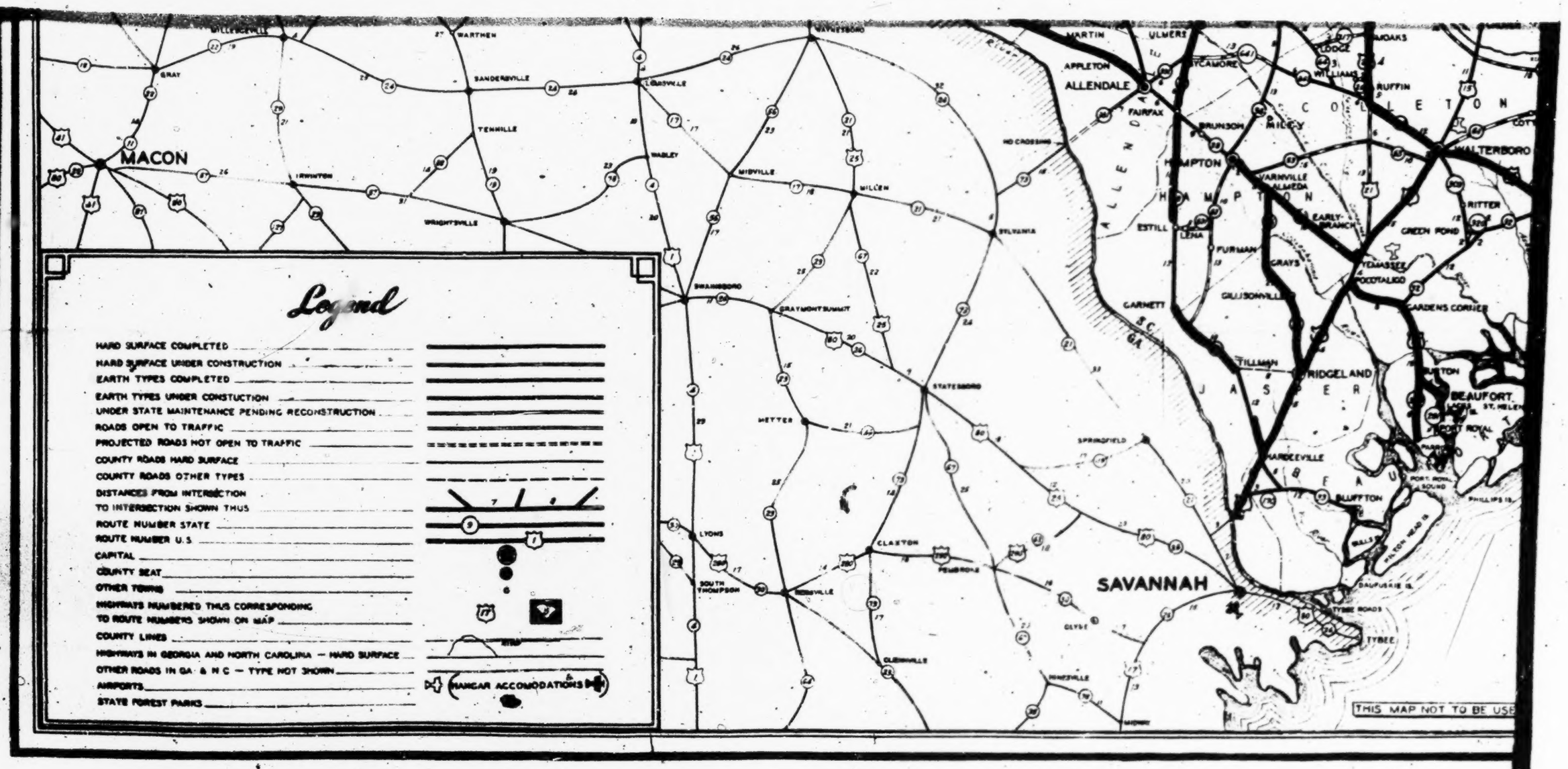
This is a map of the State Highway System of South Carolina, showing (in addition to the regular map), in red ink, the roads on which federal aid has been used.

(Here follows map of South Carolina State Highway System, Defendants' Exhibit No. 7)


CHARLOTTE
SPARTANBURG
GREENVILLE
ANDERSON
GREENWOOD
ABBEVILLE
LAURENS
NEWBERRY
COLUMBIA
LANCASTER
CHESTER
YORK
GAFFNEY
UNION
WINNSBORO
CAMDEN
SUMTER
LEXINGTON
SALUDA
EDGEFIELD
AIKEN
AUGUSTA
ORANGEBURG
BAMBERG
BARNWELL
ALLENDALE
WALTERBORO
ST. GEORGE
ST. MATTHEWS
PICKENS
WALHALLA
ATHENS
MACON
McCORMICK
CLINTON
JONESVILLE
LOCKHART
CARLISLE
WHITMIRE
CHERAWKEE
SPARTANBURG
FAIRFIELD
KERSHAW
LEE
SUMTER
CALHOUN
ORANGEBURG
BARNWELL
BAMBERG
DORCHESTER
COLLETON
HAMPTON
ALLENDALE
Lake Murray

DEFENDANTS' EXHIBIT NO. 7




Legend
HARD SURFACE COMPLETED
HARD SURFACE UNDER CONSTRUCTION
EARTH TYPES COMPLETED
EARTH TYPES UNDER CONSTUCTION
UNDER STATE MAINTENANCE PENDING RECONSTRUCTION
ROADS OPEN TO TRAFFIC
PROJECTED ROADS NOT OPEN TO TRAFFIC
COUNTY ROADS HARD SURFACE
COUNTY ROADS OTHER TYPES
DISTANCES FROM INTERSECTION
TO INTERSECTION SHOWN THUS
ROUTE NUMBER STATE
ROUTE NUMBER U.S.
CAPITAL
COUNTY SEAT
OTHER TOWNS
HIGHWAYS NUMBERED THUS CORRESPONDING
TO ROUTE NUMBERS SHOWN ON MAP
COUNTY LINES
HIGHWAYS IN GEORGIA AND NORTH CAROLINA — HARD SURFACE
OTHER ROADS IN GA. & N.C. — TYPE NOT SHOWN
AIRPORTS
STATE FOREST PARKS
HANGAR ACCOMODATIONS
MACON
SAVANNAH
ALLENDALE
HAMPTON
WALTERBORO
RIDGELAND
BEAUFORT
BLUFFTON
TYBEE
THIS MAP NOT TO BE USE

Map of
SOUTH CAROLINA
STATE HIGHWAY SYSTEM

NOT TO BE USED FOR ADVERTISING

DRAWN BY CARL W. METZ

DEFENDANTS' EXHIBIT No. 8

Testimony of Mr. C. H. Moorefield, former Chief Engineer of the South Carolina Highway Department, in the form of a prepared statement.

(NOTE.—This statement was later repeated and added to by Mr. Moorefield as a part of his testimony before the Legislative Investigating Committee. See Exhibit No. 9 following.)

[fol. 320] "The Effect of Truck and Bus Traffic on the Cost of Highway Service in South Carolina."

February 4, 1931.

At the present time all work on the State Highway System of South Carolina is paid for out of receipts from motor vehicle license fees and gasoline taxes. This plan of finance is based on the theory that State Highways are built and maintained primarily for the use of the motor vehicle and that the benefits enjoyed by the owners and operators of motor vehicles because of the improved roads are at least equal in value to the service charges that the license fees and gasoline tax represent.

The discussions and arguments which led the law makers of the State to place the entire cost burden of State Highway improvement and maintenance on the automobile were generally confined to the question of whether any part of this burden should be borne by property taxes. When this question was once settled the schedule of license fees and the rate of gasoline tax were fixed with a view to raising the desired revenue and without much regard for equity in fixing the respective amounts to be paid by the different classes of vehicles. As the State's highway investment has increased the significance of the highway service in the transport of persons and commodities has kept pace, and the problem of properly recognizing differences in the cost to the State of furnishing highway service as between different classes of motor vehicles has grown in importance. Also, the State government is now concerned with the possibility of serious inequities that may have developed as between the highway service and other agencies that are engaged in transport, particularly because of the competitive situation now existing between the highways and the railroads.

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As I understand it, the Railroad Commission is now attempting to work out plans for regulating public highway carriers that will be fair and equitable to all of the interests affected by the service that these carriers afford, and [fol. 321] the purpose of this hearing is to develop information as to the effect that truck and bus traffic has on the cost of highway service with the idea that such information will be helpful in working out this plan.

From my point of view, it is not practicable to separate the trucks and buses operating as public carriers from those that are owned and operated over the highways for other purposes. It is possible, however, by more or less rational analysis to bring out certain significant comparisons between light vehicles and heavy vehicles, as well as between small vehicles and large vehicles, as the different classes affect highway cost.

The cost of the State's highway service may, perhaps, be discussed best by separating it into the three items of construction, maintenance, and traffic control, because each of these items is affected in a different way by providing for the heavier and larger vehicles.

Construction Costs.—It is apparent to anyone who has thought even casually of highway construction that the cost must vary with the character of the road and that the character of the road in turn must vary with the character and volume of the traffic to be served. It is immediately apparent that the presence of buses and large vehicles of all sorts on the highways calls for greater width and easier curves. It is equally apparent that the supporting power of the road and its structures must be sufficient to withstand the heaviest loads to which the road will be subjected.

If our highways could be designed for a maximum vehicle load of not exceeding four tons, which would take care of an ordinary two-ton truck loaded to its rated capacity, the average cost per mile of construction would, in my judgment, be reduced by at least $3,000.00 and probably more. If this $3,000.00 per mile additional cost is multiplied by the 6,000 miles included in the State Highway System, we have a minimum estimate of $18,000,000.00 in construction cost for which the trucks and buses of unusual weight and size are responsible.

[fol. 322] Now, as a matter of fact, the total number of trucks having more than two-tons capacity, together with

all the buses and lighter trucks carrying trailers, now operating in the State would not exceed about 3,000. This means that the State is expending $18,000,000. to accommodate 3,000 vehicles and combinations of vehicles. These 3,000 vehicles represent only a little more than 1% of the total number of vehicles using the State Highways, while the estimate of $3,000. per mile additional construction cost necessary in order to provide for these vehicles represents about 15% of the average per mile construction cost.

It could be shown in the same way, of course, that trucks of less than two-ton capacity, but heavier than the ordinary vehicles which constitute the great bulk of traffic on the highways, are also responsible for some additional cost, though the comparison already made illustrates the point that I have in mind.

Maintenance costs.—The effect of large or heavy vehicles on the maintenance cost is not so clearly apparent as in the case of construction cost, because if the roads are designed at the start to accommodate the heavy vehicles the damage caused by the passage of such vehicles over the roads is automatically brought within reasonable limits. On the other hand, any road will ultimately wear out and give way under repeated strains and the heavier vehicles unquestionably cause greater wear and greater strain than the lighter vehicles. Ordinarily we have no way of attributing accelerated wear at any particular point to any special kind or class of vehicle because the roads are open to all kinds and classes, but we do have sections of road where deterioration over a period of years is pronounced and other sections that have been under traffic for an equal number of years that show much less deterioration. It appears from such studies as we have been able to make that the rate of wear has been materially influenced by the character of the traffic as well as by the volume.

We have had a very good illustration of how the traffic of heavy vehicles may affect maintenance cost by observ- [fol. 323] ing the behavior of our bridge pavements on roads that have recently been paved. For example, in one case we had a bridge built in 1925, the floor of which was covered with a ½" bituminous surfacing. An average of about two hundred and twenty-five ordinary motor vehicles, including a small percentage of trucks, crossed this bridge

every day for two years, making a total for that period of about 160,000 vehicles, which perhaps, averaged two tons gross weight, or about 320,000 tons of traffic. In 1927 the road was closed to traffic and materials for about nine and one-half miles of pavement were hauled over this bridge. The hauling was done with trucks having a gross weight of about ten tons loaded and six tons empty. The aggregate gross weight hauled over the bridge by these trucks was about 50,000 tons.

The bridge surfacing, which had withstood two years of ordinary traffic, aggregating in the neighborhood of 320,000 tons, without damage, was practically destroyed by about 50,000 tons of heavy truck traffic.

Every paving contractor has observed how the earth type roads on which he hauls go to pieces under the traffic of his heavy trucks, but there is no way of making an exact comparison between the maintenance cost under ordinary traffic with the cost under the traffic of paving trucks, because weather conditions have a marked influence in each case.

In my judgment, the damage caused our roads by the heavy vehicles is in general out of proportion to the weight of the vehicles; that is, I believe that a five-ton truck will do more than five times the damage that a one-ton truck will do, and this belief is based on observation of and experience with the State Highway work in South Carolina. On the other hand, the five ton trucks pay less gasoline tax in proportion than the one-ton trucks because they consume less gasoline per ton mile hauled. According to the best information I have been able to get, the average gasoline consumed by trucks of one-ton capacity runs about ten miles to the gallon, while a five-ton truck goes on an aver- [fol. 324] age of about 4½ miles to the gallon. This means that the one-ton truck pays the same amount of gasoline tax for hauling ten-ton miles that the five-ton truck pays for hauling about 22½ ton miles.

Traffic Control.—The problem of controlling traffic on the highways and keeping accidents within bounds is one of the most serious responsibilities that the Highway Department has, and in spite of the utmost attention that we have been able to give this problem accidents have increased out of proportion to the increase in traffic. In 1929

we had 1,417 accidents reported by our maintenance organization with 213 fatalities resulting immediately; in 1930 the total number of accidents reported on State Highways was 1,833 with 215 fatalities. The increase in fatalities in this case was relatively very small, but the increase in the total number of accidents reported was very material, and this increase has gone on in spite of the fact that we have been constantly reducing road hazards by re-locating dangerous sections, eliminating railroad grade crossings, improving visibility, and erecting warning and guide signs. The heavy trucks and large trucks and buses appear to be involved in proportionately more accidents than the ordinary vehicles. In 1930, for example, there were 195 commercial buses registered and there were eighteen accidents reported in which these buses were involved. This means that the number of bus accidents reported was about 9.2% of the number of buses operating. The report shows, also, that 50% of the accidents reported involved other motor vehicles. In comparison with these figures there were 212,190 cars and light trucks registered and only 2,312 were involved in accidents, making the number of accidents a little more than 1% of the number of vehicles, and the number involving other cars was only about 26% of the total.

The accident comparison, of course, is not conclusive because of the wide discrepancy in the number of vehicles operating and the fact that the buses cover very much more mileage during the year than the ordinary vehicle would account at least in some measure for the much higher accident report. A similar comparison between accidents involving heavy trucks and those involving ordinary ve-
[fol. 325] hicles shows a much less pronounced load for the trucks. The number of trucks above the two-ton capacity figuring in accidents during 1930 was about 3½% of the number of such trucks in operation, but the accidents involving other vehicles was about 50% of the total. Regardless of what the comparison of accident statistics may show, I believe it is an uneques-ioned fact that large trucks and buses interfere to a marked extent with the free use of the highways by ordinary vehicles. Even on our 20 ft. pavements the average driver of an automobile hates to meet a bus or a large truck and is conscious of being crowded to one side whenever he passes one.

On the whole, my judgment is that the buses and large trucks enhance the problem of traffic control all out of proportion to the relative number of such vehicles using the highways.

General Comments.—With particular reference to the competitive situation as between highways and railroads, I have made no special study, but as a general proposition it looks to me as though the railroads should be able to at least compete in the cost of transport with the trucks and buses, provided that the latter are given no special highway advantage to which they are not entitled in equity. At the present time the motor vehicles are actually paying their way so far as the State Highway System is concerned, though the buses and trucks are not, in my judgment, paying anything like a fair proportion. Also, of course, the motor vehicles are paying no taxes on the State's tremendous investment in highways. When the Highway System is complete it will represent an outlay by the State of about $120,000,000.00. If the motor vehicles were paying taxes on a 42% valuation, as are the railroads, this would represent quite an additional charge against them. Furthermore, about 3,000 trucks, buses and trailers might in equity be required to pay the additional charges representing taxes on about $18,000,000.00 of the highway investment in order to put these trucks and buses on a comparable basis with the railroads so far as taxation is concerned.

It is unquestionably a fact that the buses and trucks have [fol. 326] an important place in our community life and I am in no way suggesting that they should be ruled off the highway; at the same time it does seem to me that they might be made to carry an equitable share of the highway cost burden; or if they are to be in effect subsidized by the State the amount of the subsidy should, in my judgment, be so regulated as not to give the trucks and buses any advantages over the railroads, which enjoy no such subsidy.

It is conceivable, of course, that the transport by bus and truck might completely replace the work of the railroads, in which case the present use of the highways by bus and truck would be multiplied a great many times and the present State Highway System would in all probability become wholly inadequate for this service. If all the freight now hauled by railroad had to be carried over our public road system general reconstruction would immediately become

the order of the day and the present investment of $120,000,000.—would be small compared to what would be required for handling such a situation. It seems, therefore, that the State should hesitate to continue subsidies that encourage the over-development of truck and bus transport because of the possibility that in the end the cost to the State on account of such encouragement would be completely beyond anything that is now anticipated.

DEFENDANTS' EXHIBIT No. 9

(Defendant's exhibit No. 9, is as follows:)

Testimony of State Highway Engineer

Before Commission to Investigate Motor Transportation in South Carolina, November 10, 1931

At the request of Chairman Robinson I am identifying and presenting the identical testimony presented by me before the Railroad Commission of South Carolina on February 4, 1931.

Chairman Robinson also requested that I come here today prepared as far as practicable to suggest a workable plan for correcting the apparent inequities pointed out in my [fol. 327] testimony before the Railroad Commission as contained in the present statutes.

At the present time, I feel thoroughly convinced that in the matter of license fees and gas tax paid in to the Highway Department the trucks and buses are not contributing in anything like the proportion that they influence the cost to the State of highway service. So far as I can see clearly, however, there is no rational way to determine just what any class of vehicles should pay for the privilege of using the roads. Apparently, there is no question but that the motor vehicles should pay the entire cost of the highways System and there is no question in my mind but that the State should properly derive some net revenue from its Highway System over and above the total cost of the service. Such a net revenue is actually now being derived, though it is being applied at present, and properly so in my judgment, to extending the Highway System.

It seems reasonable that the present charges against ordinary passenger motor vehicles may be taken as representing a proper amount for these vehicles to pay for the highway service. If this is done, then it is possible by rational process to arrive at approximately comparable rates for other classes of motor vehicles based on the relative cost to the State of furnishing highway service.

Following this line of approach to the problem, it is necessary, first, to establish an approximate comparison between the cost of furnishing highway service for ordinary passenger automobiles and the cost of the same service for the larger and heavier motor vehicles.

As nearly as I am able to estimate with the few data we have collected bearing on the subject and more or less lump sum judgment as a guide, the cost of constructing and maintaining the State Highway System and regulating traffic over it is probably at least 50% more as a result of making provision for trucks and buses than it would be if traffic [fol. 328] were restricted to ordinary passenger automobiles. That is to say, the cost of constructing, maintaining and policing a State Highway System identical in extent with our present System for the exclusive use of ordinary passenger automobiles would only amount to about two-thirds as much as we are now spending on the Highway System for the same purposes, but including adequate provision for trucks, buses and trailers.

According to the motor vehicle registration records of the Highway Department, there are now operating in the State approximately 179,000 ordinary passenger automobiles, 25,000 trucks and buses, and 2,000 trailers comparable in weight and size to the trucks. This means that about one-eighth of the total number of motor vehicles should contribute to the Highway Department's revenues about one-third of the total amount, and that the schedule of fees and taxes should be arranged accordingly.

Inasmuch as there appears to be no practicable way for regulating the payment of the gasoline tax except according to the quantity of gasoline consumed, and inasmuch as the consumption of gasoline does not actually vary directly with the weight or size of the motor vehicle using the road but is proportionately less as the weight increases, it appears necessary that the entire differential to be collected from the heavier and larger vehicles should, for convenience,

be reflected in the schedule of motor vehicle license fees. With that idea in mind, I recommend:

1. That the present schedule of fees so far as it relates to the ordinary passenger automobiles be continued in effect.

2. That the schedule of fees as it relates to trucks, buses and trailers be modified to conform with the following:

Proposed Schedule of Annual Motor Vehicle License Fees for Trucks, Buses and Trailers

1. Trucks, buses and trailers having a load capacity of not exceeding one ton:	
Width not exceeding 6 ft.	$25.00
Width more than 6 ft., but not exceeding 6 ft. 6 in.	75.00
Width more than 6 ft. 6 in. but not exceeding 7 feet	200.00
[fol. 329] Width more than 7 ft. but not exceeding 7 ft. 6 in.	$500.00
2. Trucks, buses and trailers having a load capacity of more than one ton but not more than two tons:	
Width not exceeding 6 ft. 6 in.	$75.00
Width more than 6 ft. 6 in., but not exceeding 7 ft.	200.00
Width more than 7 ft., but not exceeding 7 ft. 6 in.	500.00
3. Trucks, buses and trailers having a load capacity of more than two tons but not more than three tons:	
Width not exceeding 7 ft.	200.00
Width more than 7 ft., but not exceeding 7 ft. 6 in.	500.00
4. Trucks, buses and trailers having a load capacity of more than three tons but not more than four tons	500.00
5. Trucks, buses and trailers having a load capacity of more than four tons but not more than five tons	1,250.00

The above schedule contemplates actual loads hauled, exclusive of vehicle weight, and maximum width including

loads. It also contemplates that no vehicle should be registered for load capacity greater than five tons.

It is estimated that this proposed schedule would yield, after allowing for diminution in the use of trucks, buses and trailers, somewhere about 50% as much as is yielded by the motor vehicle license fees on ordinary passenger automobiles, but, perhaps, does not make full allowance for the relatively larger gasoline tax collected against the latter.

As to the question of appropriate fees or taxes to be levied against public carriers, including both buses and trucks, I am unable to offer any very definite suggestions, except that the special privilege of carrying on public service on the State Highways should be considered apart from the ordinary service charges represented by the motor vehicle license fees and gasoline taxes. In handling this particular feature of the problem, it appears to me that equity would indicate some consideration for the effect of this service on the railroads, which constitute a competing transport agency. To my mind, the State should by all means [fol. 330] avoid any undue encouragement of transport by motor vehicles where such encouragement might contribute seriously to the present dilemma of the railroads, unless it is very certain that the service to be performed by the motor vehicle carriers is absolutely needed in the interest of public convenience. What I mean to say is that any charge that the State may make against a public motor vehicle carrier for the privilege of using the highways should in reality be considered as secondary to the question of whether the carrier service is actually needed in the interest of public convenience and economy.

The highways of South Carolina are absolutely not in shape at present to bear all of the traffic that would come upon them if railroad operations were suspended generally and, furthermore, the increasing bus and truck traffic on the highways is unquestionably objectionable to the great majority of highway users who now travel in ordinary passenger automobiles. In my judgment, therefore, the State should hesitate at the present time to encourage even the most gradual substitution of highway carrier service for the railway service. Only can public highway carrier service be completely justified where it unquestionably supplements available railway service. On the other hand, there is no question but that the people of the State are

entitled to whatever real net advantage the motor vehicle can be made to afford them. They are entitled, in my judgment, to have their products collected by truck and their needs delivered in the same way, and they are also entitled to enjoy any real net saving incost of transportation that the truck can effect, but nobody is entitled to have the State government materially foster destructive competition for their benefit. For the State to set up highway facilities for trucks and buses to use in competition with the established railroads and not charge in full for the use of these facilities, would, in my judgment, be like felling a large tree in order that goats might eat their leaves.

In conclusion, I believe the State Highway System is [fol. 331] one of the most important developments now under way and that the State cannot afford delay in connecting and completing the highway work that it has undertaken. Ultimately the Highway System ought to be a great source of revenue for the State. Before any of this revenue is diverted to other purposes than the extension of the Highway System, the work should at least have reached the point where further extension will not serve to increase the net revenue. In other words, I see no reason why the State Highway System should not be regarded as a great public utility that ought properly be developed and adapted so as to yield the greatest possible net benefit to the people of the State. The production of public revenue through actual service rendered by the government would certainly be in the class of public benefits.

DEFENDANTS' EXHIBIT No. 10

(Defendant's exhibit 10, so offered and receive- in evidence, is a printed report of the Motor Transportation Investigating Committee, of South Carolina. The following statement of Mr. Charles H. Moorefield, State Highway Engineer, which will be found on pages 14 through 18 of said printed record, was read in evidence, and is as follows:)

"Mr. Charles H. Moorefield, State Highway Engineer:

At the request of Chairman Robinson he made a statement in his own way. He presented the identical testimony given by him to the Railroad Commission on February 4th.

In this statement he said that at the present all work on the State Highway System in South Carolina is paid for out of receipts from motor vehicle license fees and gasoline taxes. Theory was that the State Highways are built and maintained primarily for the use of motor vehicles. When it was decided that the burden should not be borne by property taxes a schedule of license fees and a rate of gasoline were fixed with a view to raising the desired revenue and without much regard for equity in fixing the respective amounts to be paid by different classes of [fol. 332] vehicles. The problem of recognizing properly differences in cost to state of furnishing highway service as between different classes of motor vehicles has grown in importance. "The State government is now concerned with the possibility of serious inequities that may have developed as between the highway service and other agencies that are engaged in transport, particularly because of the competitive situation now existing between highways and the railroads."

"From my point of view it is not practicable to separate the trucks and buses operating as public carriers from those that are owned and operated over the highways for other purposes."

"If our highways could be designed for a maximum vehicle load of not exceeding four tons, which would take care of an ordinary two-ton truck loaded to its rated capacity, the average cost per mile of construction would, in my judgment, be reduced by at least $3,000. and probably more. If this $3,000.00 per mile additional cost is multiplied by 6,000 miles included in the State Highway System, we have a minimum estimate of $18,000,000 in construction cost for which the trucks and buses of unusual weight and size are responsible.

"Now, as a matter of fact, the total number of trucks having more than two-ton capacity, together with all the buses and lighter trucks carrying trailers, now operating in the State would not exceed about 3,000. This means that the State is expending $18,000,000. to accommodate 3,000 vehicles and combination of vehicles. These 3,000 vehicles represent only a little more than 1% of the total number of vehicles using the State highways, while the estimate of $3,000. per mile additional construction cost necessary in order to provide for these vehicles represents about 15% of the average per mile construction cost."

He cited the example of a bridge built in 1925, over which had passed during the two next years about 160,000 vehicles, which perhaps averaged two tons gross weight, or about 320,000 tons of traffic. In 1927 the bridge was closed to traffic and materials for road building hauled over the bridge by trucks having a gross weight of ten tons [fol. 333] loaded and six tons empty. The bridge surfacing which had withstood two years of ordinary traffic, aggregating in the neighborhood of 320,000 tons without damage, was practically destroyed by about 50,000 tons of heavy truck traffic.

As to accidents, comparing commercial buses with private cars and light trucks, a total number of 212,190 with 2,312 accidents a little more than 1%. In 1930, with 195 commercial buses there were eighteen accidents on 9.2% of buses operated.

He had no study of the competitive situation between highways and railroads. "At the present time the motor vehicles are actually paying their way, so far as the State Highway System is concerned, though the buses and trucks are not, in my judgment, paying anything like a fair proportion. In his typewritten statement presented November 10th, he said:

"At the present time, I feel thoroughly convinced that in the matter of license fees and gas tax paid in to the Highway Department the trucks and buses are not contributing in anything like the proportion that they influence the cost to the State of highway service. So far as I can see clearly, however, there is no rational way to determine just what any class of vehicles should pay for the privilege of using the roads. Apparently there is no question but that the motor vehicles should pay the entire cost of the Highway System over and above the total cost of the service. Such a net revenue is actually now being derived, though it is being applied at present, and properly so, in my judgment, to extending the Highway System."

"As nearly as I am able to estimate with the few data we have collected bearing on the subject and more or less lump sum judgment as a guide the cost of constructing and maintaining the State highway system and regulating traffic over it is probably at least 50% more as a result of making provision for trucks and busses than it would be

if traffic were restricted to ordinary passenger automobiles. * * *

"According to the motor vehicle registration records of the Highway Department, there are now operating in the State approximately 179,000 ordinary passenger automo-
[fol. 334] biles, 25,000 trucks and buses and 2,000 trailers comparable in weight and size to the trucks. This means that about one-eighth of the total number of motor vehicles should contribute to the Highway Department's revenues about one-third of the total amount, and that the schedule of fees and taxes should be arranged accordingly.

He recommends the following schedule of motor vehicle license fees:

1. Trucks, buses and trailers having a load capacity of not exceeding one ton:	
Width not exceeding 6 ft.	$25.00
Width more than 6 ft. but not exceeding 6 ft. 6 in.	75.00
Width more than 6 ft. 6 in. but not measuring 7 ft.	200.00
Width more than 7 ft. but not exceeding 7 ft. 6 in.	500.00
2. Trucks, buses and trailers having a load capacity of more than one ton but not more than two tons:	
Width not exceeding 6 ft. 6 inches	$75.00
Width more than 6 ft. 6 in. but not exceeding 7 ft.	200.00
Width more than 7 ft. but not exceeding 7 ft. 6 in.	500.00
3. Trucks, buses and trailers having a load capacity of more than two tons but not more than three tons:	
Width not exceeding 7 ft.	200.00
Width more than 7 ft. but not exceeding 7 ft. 6 inches	500.00
4. Trucks, buses and trailers having a load capacity of more than three tons but not more than four tons	500.00
5. Trucks, buses and trailers having a load capacity of more than four tons but not more than five tons	1,250.00

"The above schedule contemplates actual loads hauled, exclusive of vehicle weight, and maximum width including loads. It also contemplates that no vehicle should be registered for load capacity greater than five tons."

He was unable to offer very definite suggestions as to appropriate fees or taxes to be levied against public carriers, including both bus- and trucks "except that the spe- [fol. 335] cial privilege of carrying on public service on the state highways should be considered apart from the ordinary service charges represented by the motor vehicle license fees and gasoline taxes. * * * To my mind the State should by all means avoid any undue encouragement that might contribute seriously to the present dilemma of the railroads unless it is very certain that the service to be performed by the motor vehicle carriers is absolutely needed in the interest of public convenience. I see no reason why the State Highway System should not be regarded as a great public utility, that ought to be properly developed and adapted so as to yield the greatest possible net benefit to the people of the State. The production of public revenue through actual service rendered by the government would certainly be in the class of public benefits."

In rely to questions Mr. Moorefield said that in northern latitudes they could not use the same light roads that could be used here and that the heavier trucks did increase the wear on such roads as were constructed here. That the Federal Government, while it did make contribution to several types of road—sand, clay and others—in this State, at this time the whole federal contribution could be absorbed in the highest type concrete roads in this State. He believed that unless this State built roads that interstate travel could use, federal appropriations would not come to this State. He thought it vital to this State to protect its own roads and he saw no reason why it should ask the Federal Government by congressional legislation to do this. He did not think it desirable to allow the residents of Georgia and North Carolina any privileges that were not allowed the citizens of this State. He thought residents of South Carolina should have the preference. Mr. Moorefield felt that it was necessary to control the common carrier more carefully than the individual user of the highways, but that the scale of fees recommended by him should

apply to all trucks and then some additional tax to the common carrier, the additional tax to cover the cost of regulation and proper control. "To foster the development of the common motor truck carrier means that probably [fol. 336] we are going to take on the burden of freight transport; that we are going to gradually assume the burden of freight transport for the highway that is now being handled by the railways, and that certainly the State should go slow in encouraging that burden on the highways. That is the point of view that I meant to occupy in expressing that opinion." "All that I know is that the roads are not in condition, and no prospect for them to be in condition, to assume the burden of railroad traffic and the freight traffic."

He said there were 53,000 miles of road in the State and approximately 6000 under the State Highway system. The gasoline tax of one cent went to the counties and five cents to the State highways. There were 2400 miles paved or in process of being paved; 900 miles of bituminous surface or in process of being bituminous surfaced, the balance of 6000 miles, sand and clay roads. Federal statute provides not exceeding 7% of total mileage in the State as eligible for inclusion in the Federal aid system; 7% of 53,000 miles, or 3700 miles would be subject to Federal aid. He had no doubt but that the General Assembly had the right to regulate all highway traffic, interstate or other, according to speed and weight in a reasonable way. If trucks or buses operated in other states and South Carolina should interpose objections to their use of her roads there would be strong evidence of unreasonableness. Mr. Moorefield stated that there were now approximately 179,000 ordinary passenger automobiles licensed in the State, 25,000 trucks and buses. Many citizens did not own cars. That to undermine the railroad service would, in his judgment, cripple the poor man. Mr. Moorefield said that he recommended that whoever operated heavy large vehicles over the roads be charged the same, whether he be private carrier, common carrier, or contract carrier. Mr. Moorefield pointed out that his schedule increased the license fee on the one-ton truck only $10,000 a year, but that on the big truck, which [fol. 337] was a menace to the road the increase was greater. He thought probably there would be an outcry against his schedule but he believed it to be right.

In answer to questions he said that it had been recommended to the Legislature to limit the length of trucks on the road to 33 ft. but that the Legislature had increased it to 50."

[fol. 338] PLAINTIFFS' EXHIBIT No. 11

United States Department of Agriculture, Bureau of Public Roads

Mileage of Approved Federal Aid Highway System as of September 30, 1935

State	Mileage
Alabama	4,146
Arizona	2,011
Arkansas	5,318
California	6,110
Colorado	3,798
Connecticut	1,109
Delaware	766
Florida	2,627
Georgia	5,905
Idaho	3,396
Illinois	8,266
Indiana	5,215
Iowa	7,987
Kansas	8,702
Kentucky	3,843
Louisiana	2,892
Maine	1,674
Maryland	2,206
Massachusetts	1,993
Michigan	6,350
Minnesota	7,506
Mississippi	3,841
Missouri	7,805
Montana	5,816
Nebraska	5,755
Nevada	1,782
New Hampshire	1,049
New Jersey	1,526
New Mexico	3,700
New York	8,915

Plaintiff' Exhibit No. 11—Continued

State	Mileage
North Carolina	6,249
North Dakota	7,242
Ohio	6,973
Oklahoma	8,129
Oregon	3,941
Pennsylvania	7,518
Rhode Island	521
South Carolina	4,322
South Dakota	8,596
Tennessee	4,832
Texas	13,218
Utah	1,842
Vermont	1,099
Virginia	4,474
Washington	3,547
West Virginia	2,354
Wisconsin	5,988
Wyoming	3,590
Hawaii	532
District of Columbia	73
Total	227,049

[fol. 339] DEFENDANTS' EXHIBIT No. 13

(Defendant's exhibit 13, so offered and received in evidence is in words and figures as follows:)

Motor Vehicle Division
Truck Registrations and Receipts
1933 to 1936

		Registrations			
	Class	1933	1934	1935	1936
H	Not over 1 ton	8,857	10,046	12,576	14,243
I	1 ton solid	6	9	8	11
J	1 to 2 tons	8,252	9,917	12,507	13,578
K	2 tons solid	64	50	33	26
L	2 to 3 tons	522	764	1,580	2,306
M	3 tons solid	13	11	6	5
N	3 to 4 tons	74	70	175	309
O	4 ton solid	4	2	1	0
P	4 to 5 tons	3	8	12	19
Q	5 ton solid	0	0	0	0
	Totals	17,795	20,877	26,898	30,497

[fol. 340] DEFENDANTS' EXHIBIT No. 14

(Defendant's exhibit 14, so offered and received in evidence is in words and figures as follows:)

Table Number 8-3
Motor Vehicle Licenses

Year	Auto's	Trucks	Trailers	Motor-cycles	Dealers
1925	153,978	15,409	817	173	535
1926	163,368	17,599	1,006	270	519
1927	178,995	18,580	1,368	255	508
1928	194,267	22,538	1,637	432	658
1929	205,683	25,591	2,048	451	628
1930	195,405	26,261	2,111	559	595
1931	180,100	23,439	1,110	492	537
1932	157,680	19,567	2,041	487	476
1933	145,644	17,795	1,764	444	469
1934	182,052	20,877	1,919	560	522
1935	206,158	26,841	2,655	641	604
1936	218,690	30,492	3,091	617	598

[fol. 341] DEFENDANT'S EXHIBIT No. 16

		No. of Vehicles	Trucks				Trailers			
			1½	2	3	4 Total	1½	2	3	4 Total
	A.A.A. Highway Express, Atlanta, Ga.	2	1			1	1			1
X	E. T. & W. N. C. Motor Transportation, Johnston City, Tenn.	4	2			2	2			2
	Ft. Sumter Navigation Tours, Mt. Pleasant, S. C.	1	1			1				
X1	Georgilina Motor Express, Savannah, Ga. (Two vehicles Extras)—1½ tons	10	4			4		4		4
	Inland Waterways Transp. Co., Georgetown, S. C. (One vehicle Extra)—1½ tons	2	1			1				
	Long Motor Lines, Greenwood, S. C.	1	1							
	Milk Transport Co., Denmark, S. C.	1	1			1				
X2	Miller Motor Express, Charlotte, N. C. (Tour vehicles Extras)—2-1½, 2-2	14	4		1	5		4	1	5
	R. L. Murray, St. George, S. C.	2	1			1	1			1
Z3	New South Express Lines, Columbia, S. C. (24 vehicles Extras)—20-1½, 2-2, 4-3	52	11	9		20	2	2	4	8
	Nilson Motor Express, Walterboro, S. C.	4	2			2	2			2
X	Poole Transportation Co., Greenville, S. C.	6		3		3		3		3
	Jerry T. Riley, Ridgeville, S. C.	1	1			1				
X	Southeastern Express Co., Atlanta, Ga.	3	1	1		2		1		1
X	The Transportation, Inc., Greenville, S. C. (One vehicle extra—1½)	8		6		6		1		1
		111	31	19	1	.. 50	8	15	5	.. 28

X Interstate only.
Z1 4 trucks—2 trailers Interstate only.
Z2 3 trucks—3 trailers Interstate only.
Z3 2 trucks—2 trailers Interstate only.

[fol. 342] IN UNITED STATES DISTRICT COURT

APPENDIX TO STATEMENT OF EVIDENCE

Act V

Uniform Act Regulating Traffic on Highways

This Act is part of Uniform Vehicle Code Consisting of:

I. "Uniform Motor Vehicle Administration, Registration Certificate of Title and Antitheft Act"

II. "Uniform Motor Vehicle Operators' and Chauffeurs' License Act"

III. "Uniform Motor Vehicle Civil Liability Act"

IV. "Uniform Motor Vehicle Safety Responsibility Act"

V. "Uniform Act Regulating Traffic on Highways"

As revised and approved by the Fourth National Conference on Street and Highway Safety, May 23-25, 1934.

U. S. Department of Agriculture, Bureau of Public Roads

United States Government Printing Office, Washington: 1934

[fol. 343] Published Under Authority Contained in The Federal Highway Act (42 Stat. 212), Approved November 9, 1921

Foreword

This act is one of five acts which constitute the uniform vehicle code as revised and recommended for State enactment as the foundation for uniform traffic regulation.

The uniform vehicle code was originally prepared in 1925-26 by the National Conference on Street and Highway Safety in cooperation with the National Conference of Commissioners on Uniform State Laws. It was reviewed and revised by the National Conference on Street and Highway Safety in 1930 and again this year. In each case the revisions were based upon thorough study by a representative committee, extending over a period of months, of the provisions of the various acts in the light of experience and changed conditions.

The changes in substance in the present code from the 1930 draft are few. The speed restrictions have been rewritten to make them simpler and more easily understood. The lighting provisions for motor vehicles have been revised in recognition of recent mechanical developments. Changes have been made in the sections dealing with sizes and weights of motor vehicles. There has been incorporated provision for periodic inspection of motor vehicles.

The first two acts of the 1930 draft covering respectively vehicle registration and certificate of title, have been consolidated and amplified to provide for a highway patrol and new administrative features. Two new acts have been added, dealing respectively with civil liability and safety responsibility. Former acts III and IV, covering respectively drivers' licenses and regulation of traffic on highways, have been renumbered acts II and V. In all of the acts long sections have been broken up into shorter sections for clarity.

[fol. 344] The National Conference on Street and Highway Safety, as heretofore, recommends two other sets of standards to supplement the uniform vehicle code—a model municipal traffic ordinance for municipalities and a Manual on Uniform Traffic Control Devices—the latter now covering conditions both in rural areas and in cities.

The importance of uniform legislative standards in reducing accidents and facilitating the movement of traffic cannot be overestimated, and the adoption of these standards by all States and municipalities is earnestly recommended.

Daniel C. Roper, Secretary of Commerce, Chairman, National Conference on Street and Highway Safety.

Washington, D. C., July 31, 1934.

NOTE.—The following associations have cooperated with the Department of Commerce in conducting the Conference: Bureau of Public Roads, U. S. Department of Agriculture; American Association of Motor Vehicle Administrators; American Automobile Association; American Mutual Alliance; American Railway Association; American Transit Association; Chamber of Commerce of the United States; National Automobile Chamber of Commerce; National Bureau of Casualty and Surety Underwriters; and National

Safety Council. The Automobile Club of Southern California has made substantial contributions to the staff work of the uniform vehicle code and model municipal traffic ordinance.

Sec. 145. Wheel and axle loads.[10]—(a) The gross weight upon any wheel of a vehicle shall not exceed the following:

1. When the wheel is equipped with a high pressure pneumatic, solid rubber or cushion tire, 8,000 pounds.

2. When the wheel is equipped with a low pressure pneumatic tire, 9,000 pounds.

(b) The gross weight upon any one axle of a vehicle shall not exceed the following:

[fol. 345] 1. When the wheels attached to said axle are equipped with high-pressure pneumatic, solid rubber or cushion tires, 16,000 pounds.

2. When the wheels attached to said axle are equipped with low-pressure pneumatic tires, 18,000 pounds.

(c) For the purpose of this section an axle load shall be defined as the total load on all wheels whose centers are included within two parallel transverse vertical planes not more than 40 inches apart.

(d) For the purposes of this section every pneumatic tire designed for use and used when inflated with air to less than 100 pounds pressure shall be deemed a low-pressure pneumatic tire and every pneumatic tire inflated to 100 pounds pressure or more shall be deemed a high-pressure pneumatic tire.

The American Association of State Highway Officials recommends the limitations stated for vehicles operated on all main rural and inter-city roads but suggests that heavier axle loads might be permitted upon vehicles operating in metropolitan areas if any city so desires. Also, The American Association of State Highway Officials recommends that the State highway department be authorized to restrict wheel and axle weights for reasonable periods where road subgrades are materially weakened by thawing after deep frost or from a continued saturated condition of the soil.

[fol. 346] S. A. E. Transport Code Committee Makes Report for Study by Members

Load and Dimension Limitations on Motor Vehicles Developed by S. A. E. Automotive Transport Code Committee

The following recommendations are based on practical engineering requirements for the design and operation of motor trucks and their combination of units.

1. Width

The maximum body width shall be 96 in. The maximum width over dual pneumatic tires measured on a line through the center of the hub, parallel to the ground, shall be 102 in.

Weights:

(a) Definitions of Thoroughfares—

(1) Streets—Thoroughfares within municipalities and immediately contiguous metropolitan districts.

(2) Highways—Main arterial routes between cities and towns and connecting industrial areas.

(3) Roads—all others.

(b) Weight Limitations—The minimum (or least) maximum axle weight limitations in pounds, in lieu of limitations in gross weight and inch width of tires, shall be

	Streets (1)	Highways (2)	Roads (3)
High pressure pneumatics	22,500	18,000	16,000
Balloon Type Tires	22,500	20,000	18,000
Solid Tires (See note 1)	22,500	Not allowed	Not allowed

[fol. 347] Who Shall Use the Highways and How

Published by The American Association of State Highway Officials

General Offices, 1222-24 National Press Building, Washington, D. C.

Wheel Loads vs. Gross Loads

Those who would elim-ate any competition in transportation by prohibiting even properly adjusted regulations in

the weights of vehicles on the highways, declare that it will take hundreds of millions of dollars to build the present system up to the standard to meet the requirements of this Association's recommendations, basing their statement on the false premise that the gross weights that would be permitted could not be borne by existing highways.

Highway stresses are ruled by wheel loads and not by gross loads. Those who really seek the protection of the highways should help to impress that fact indelibly upon the minds of legislators and law enforcement officers. For, it so happens, that the wheel load is not only the more [fol. 348] critical factor but is also the more easily determinable factor. To measure gross loads, stationary platform scales are a practical necessity; and, unless they are placed and actually operated on at least all important roads, the gross load limitation, whatever it may be, will be a virtual deadletter. The wheel load limitation is, on the other hand, easily enforceable by officers, equipped with small, portable scales who, appearing suddenly, first on one road, then on another, may plant their telltale instrument by the roadside and require any driver to run his heaviest wheel on it, and so, quickly and practically, detect the law violators. And of this at least there can be no question: That for the protection of the roads an enforced wheel load limitation is immeasurably better than an unenforceable gross load limitation.

It has been shown in this article that the wheel loads proposed by the Highway Officials exceed those now legally prescribed in only three States. This fact alone should allay any reasonable fear that adoption of the Association's weight suggestions would loose upon the highways a destroying caravan of excessively heavy vehicles.

Gross Weight, Dimensions and Speed for Vehicles Recommended for Adoption

It is the opinion of the Association of State Highway Officials that the adoption of a uniform standard to govern gross weight, dimensions, and speeds for motor vehicles operating on the highways is a fundamental necessity for the following reasons:

(a) To establish one of the fundamental prerequisites of highway design.

(b) To promote efficiency in the interstate operation of the motor vehicle.

(c) To secure safety in highway operation.

(d) To remove from the highways undesirable equipment and operations.

(e) To stabilize on a definite basis the many relationships between the highway and the motor vehicle.

[fol. 349] These conclusions have been reached after many years of consideration on the part of the Highway Transport Committee of the Association, supplemented by painstaking research by a number of the State Highway Departments and the Bureau of Public Roads.

The Association therefore makes the following recommendations to the proper State authorities having control of traffic on the highways:

(1) Width

Width of a Vehicle—No vehicle shall exceed a total outside width, including and load thereon, of 8 feet, except vehicles now in operation which, by reason of the substitution of pneumatic tires for other types of tires, exceed the above limit.

(5) Axle Load

(a) The wheels of all vehicles, including trailers, except those operated at 10 miles per hour or less, shall be equipped with pneumatic tires.

(b) No wheel equipped with high pressure, pneumatic, solid rubber or *chusion* tires shall carry a load in excess of 8,000 pounds, or any axle load in excess of 16,000 pounds.

Research indicates that low-pressure pneumatic tires can carry 9,000 pounds per wheel without increasing pavement slab stresses.

An axle load shall be defined as the total load on all wheels whose centers may be included between two parallel transverse vertical planes 40 inches apart.

(c) These limitations are recommended for all main rural and inter-city roads, but should not be construed as inhibiting heavier axle loads in metropolitan areas if any State desires.

(d) These weight specifications for wheel and axle loads may be restricted by the State Highway Department for a reasonable period where road subgrades are materially weakened from thawing after deep frost, or from a continued saturated condition of the soil.

[fol. 350] Excerpt from the Testimony of Thomas H. MacDonald, Chief of the Bureau of Public Roads, Before the Interstate Commerce Commission, Dec. 5, 1931, Docket No. 23400

Chairman Brainerd: If pneumatic tires are used, what would be the maximum load that could safely be carried on the improved highways in which the Government has aided?

A. We believe that the maximum wheel load should be limited to about 9,000 pounds; gross loads heavier than that would make a 9000 wheel load. We believe if it is desired to move heavier loads the number of wheels should be increased containing the 9,000 pound concentration, so that if you want to go above that then we should place instead of four wheels six wheels or an increasing number of axles, so that we will not obtain more than 18,000 pounds per axle. The roads that we are building today will stand 18,000 pound axle load on pneumatic tires.

I do not *want* whether I make that point quite clear. Our tests show that in the application of wheel loads to the road, if the wheel rests as much as 36 to 40 inches apart, if the point of contact of one wheel is 46 inches ahead of the next wheel, there is no overlap of stresses in the road structure. In other words the road has to carry only the weight of each particular wheel. The stresses did not pile up. Therefore, if we had a load to move on the roads that would take more than 18,000 pounds on the rear axle it should be solved by placing two 18,000 rear axles with four wheels in place of two wheels. Do I make that clear?

Q. This morning, in your testimony, about highways carrying vehicles with an axle load of 9,000 pounds——

A. A wheel load.

Q. May I ask if you were referring to an 8-7-8 concrete highway or in substance that?

A. I think the table shows that that would be safe for that particular load, but in this case 7½ edged thickness, with 6½ center thickness, would carry such a load with an extreme fibre stress of 358 pounds, just right at the maximum

working stress we would sue of 350 pounds, but that does not necessarily mean, if I may explain, that we would use [fol. 351] just these dimensions. There are other factors which enter, depending largely upon climatic or soil conditions or the interrelationship of those two. In the south, for example, where we have an absence of frost action and good sub-grades to support, we would approve a cross-sectional design for the same loads much lighter than we would in the northern states. Take in South Carolina, we are building roads even lighter than 8 6 8; that is, we have actually gone to about this point of 7½ edge thickness, but we could not use that same design in the northern states.

[fol. 352]

Calendar No. 146

Senate

67th Congress, 1st Session

Report No. 134

Continuation of Federal Aid in the Construction of Highways

June 20, 1921.—Ordered to be Printed

Mr. Townsend, from the Committee on Post Offices and Post Roads, submitted the following:

Report (to accompany S. 1355)

The Committee on Post Offices and Post Roads, to whom was referred the bill (S. 1355) to provide for the establishment, construction, and maintenance of a post roads and interstate highway system, to create a Federal highway commission, and for other purposes, report it back with amendments, and as thus amended recommend its passage.

In view of the very general interest in the subject and the fact that the Committee on Post Offices and Post Roads has held hearings and given serious thought and consideration to the subject over a period of several years, the committee feels justified in presenting a general review of its labors and an analysis of the bill here presented together with a statement of the essential differences from the law passed in 1916 as amended in 1919.

A new era in transportation confronts the United States. An evolution of far-reaching social, political, and industrial

importance has been effected through the constantly grow-
[fol. 353] ing use of highway transport. The modern motor vehicle has rendered obsolete old methods of highway construction, maintenance, and administration. The question is no longer local alone in application; it is national. Obviously our highway policies must be broadened and straightened to meet this changed condition if public expenditures are to be conserved and the best interests of the Nation cared for. Living costs can be reduced, and our defense strengthened, and a new spirit of nationalism created if we use intelligently this new means of communication between communities and States.

President Harding in his first message to Congress, delivered Tuesday, April 12, 1921, recommended the strengthening of laws governing Federal aid for road construction. In the course of his message he made the significant statement that the principle of Federal aid had been "acceptably established, probably never to be abandoned." The President's recommendation concerning highway development is given below:

Transportation over the highways is little less important (referring to the railways), but the problems relate to construction and development, and deserve your most earnest attention, because we are laying a foundation for a long time to come, and the creation is very difficult to visualize in its great possibilities.

The highways are not only feeders to the railroads and afford relief from their local burdens, they are actually lines of motor traffic in interstate commerce. They are the smaller arteries of the larger portion of our commerce, and the motor car has become an indispensable instrument in our political, social, and industrial life.

There is begun a new era in highway construction the outlay for which runs far into hundreds of millions of dollars. Bond issues by road districts, counties, and States [fol. 354] amount to enormous figures, and the country is facing such an outlay that it is vital that every effort shall be directed against wasted effort and unjustifiable expenditure.

The Federal Government can place no inhibition on the expenditure in the several States; but, since Congress has embarked upon a policy of assisting the States in highway

improvement, wisely, I believe, it can assert a wholly becoming influence in shaping policy.

With the principle of Federal participation acceptably established, probably never to be abandoned, it is important to exert Federal influence in developing comprehensive plans looking to the promotion of commerce and apply our expenditures in the surest way to guarantee a public return for money expended.

The need for a national policy that will develop a connected and correlating system of public highways that will adequately serve the requirements of the whole country and reduce the costs of transportation between producer and consumer, a system that will supplement our great railroad and water transportation, is apparent to every student of this question.

[fol. 355] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed February 25, 1937

To the Honorable John J. Parker, United States Circuit Judge, Honorable Elliott Northcott, United States Circuit Judge, and Honorable J. Lyles Glenn, United States District Judge, composing a District Court for the Eastern District of South Carolina, pursuant to section 266, as amended, of the Judicial Code of the United States (Title 28, United States Code, section 380):

Your petitioners, defendants in the above entitled cause, South Carolina State Highway Department; South Carolina Public Service Commission; Joseph N. Poulnot, individually, and as Sheriff of Charleston County, and as representative of all such officers; George Bell Timmerman, individually, and as Chairman of the State Highway Commission of South Carolina, and as representative thereof; Ben M. Sawyer, individually, and as Chief Highway Commissioner of South Carolina; Alfred W. Bohlen, individually, and as Director of the Motor Vehicle Division of the State Highway Department of South Carolina, and as representative of said department; S. Eakin Wilson, individually, and as State Inspector for the State Highway

Department of South Carolina for Charleston County, and as representative of all like officers in South Carolina; Tee Hutto, individually, and as Patrolman for the State Highway Department of South Carolina in Charleston County, and as representative of all like officers in South Carolina; James W. Wolfe, individually, and as Chairman of the [fol. 356] South Carolina Public Service Commission, and as representative thereof; William W. Goodman, individually, and as Superintendent of the Motor Transportation Division of the South Carolina Public Service Commission, and as representative thereof; Benjamin K. Sanders, individually, and as State Inspector for the South Carolina Public Service Commission for Charleston County, and as representative of all like officers in South Carolina; Harold Fox, individually, and as Magistrate's Constable in Charleston County, and as representative of all like officers in South Carolina; Christian H. Ortmann, individually, and as Chief of Police for the City of Charleston, South Carolina, and as representative of all municipal police officers in the State of South Carolina; Atlantic Coast Line Railway Company; Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, and Charleston & Western Carolina Railway Company, respectfully show:

Your petitioners, defendants in the above entitled cause, considering themselves aggrieved by the final decree of said United States District Court for the Eastern District of South Carolina, entered in this cause on January 20, 1937, pray and appeal to the Supreme Court of the United States from said decree.

The errors for which your petitioners claim to be entitled to the appeal herein prayed for are more fully set out in the assignment of errors filed with the Clerk of this Court pursuant to Rule 9 of the Rules of the Supreme Court of the United States; and there has been likewise filed herewith the statement required by Rule 12 of said Rules disclosing the basis for the jurisdiction of the Supreme Court of the United States to review said order or decree.

Wherefore, in order that your petitioners may obtain relief in the premises and have an opportunity to show the errors complained of, your petitioners pray for an allowance of an appeal in this cause to the Supreme Court of the United States pursuant to the statutes and rules of said Court; that a true copy of the material parts of the record

[fol. 357] herein, including the assignment of errors, shall be made and transmitted to said Court in the manner and form prescribed by Rule 10 of the Rules of said Court, and that such further order or orders be made as may appear to this Court necessary or proper for the allowance of the appeal herein prayed.

February 22, 1937.

John M. Daniel, Attorney General of South Carolina; J. Ivey Humphrey, Assistant Attorney General of South Carolina; M. J. Hough, Assistant Attorney General of South Carolina; Eugene S. Blease, Steve C. Griffith, Solicitors for Original Defendants. Thomas W. Davis, Douglas McKay, Attorneys for Atlantic Coast Line Railroad Company; M. G. McDonald, Attorney for C. & W. C. Ry. Co.; J. B. S. Lyles, Attorney for Legh R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, Solicitors for Intervening Defendants.

[fol. 358] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed February 25, 1937

The petition of the defendants in the above entitled cause for an appeal to the Supreme Court of the United States from the decree of the District Court of the United States for the Eastern District of South Carolina having been filed herein, accompanied by an assignment of errors and statement as to jurisdiction, all as required by Rules 9 and 12 of the Rules of the Supreme Court of the United States, and the said papers having been presented to this Court, and the record in this case having been considered:

It is hereby Ordered that an appeal be, and it is hereby, allowed to the Supreme Court of the United States from the final decree of the District Court of the United States for the Eastern District of South Carolina, entered in this cause on the 20th day of January, 1937, and that the Clerk of this Court shall, within forty days from this date, make and transmit to the Supreme Court of the United States, under

his hand and the seal of this Court, a true copy of the material parts of the record herein, which shall be designated by præcipe or a stipulation of the parties or their counsel herein, all in accordance with Rule 10 of the Rules of the Supreme Court of the United States.

It is further Ordered that the appellants shall give a good [fol. 359] and sufficient cost bond in the sum of Two Hundred Fifty Dollars ($250), conditioned as required by law.

Done by this Court, this 23rd day of February, 1937.

J. Lyles Glenn, United States District Judge for the Eastern District of South Carolina.

[fols. 360-362] Bond on appeal for $500, approved and filed February 25, 1937, omitted in printing.

[fol. 363] In United States District Court

[Title omitted]

Præcipe for Record—Filed February 25, 1937

To the Clerk of the United States District Court for the Eastern District of South Carolina:

Counsel for defendants, appellants in above cause, request you to prepare and transmit, under your hand and the seal of the Court, to the Supreme Court of the United States, with reference to the appeal in this cause to said Court, a transcript of the record in this cause, as required by law and by the Rules of the said Court, and to include in said transcript of the record true copies of the following:

1. Bill of Complaint, filed August 11, 1936, omitting Subpœna.
2. Defendants' Motion to Dismiss, filed September 19, 1936.
3. Memorandum Opinion of District Judge upon Motion to Dismiss, filed October 24, 1936.
4. Order Granting Defendants' Motion to Dismiss as to certain paragraphs of Complaint, filed November 2, 1936.
5. Order Overruling Defendants' Motion to Dismiss as to Paragraph 9 of Bill of Complaint, filed November 2, 1936.

6. Plaintiffs' Motion for Temporary Injunction, filed November 2, 1936.

[fol. 364] 7. Order Permitting the filing of Motion for Temporary Injunction, filed November 2, 1936.

8. Memorandum Opinion on Motion for Temporary Injunction, filed November 2, 1936.

9. Temporary Restraining Order, filed November 2, 1936.

10. Answer, filed November 7, 1936.

11. Order Convening Statutory Three Judge Court, filed November 13, 1936.

12. Petition of Interstate Commerce Commission to Intervene as a Plaintiff, filed November 17, 1936.

13. Defendants' Motion to Dismiss Complaint, filed November 24, 1936.

14. Petition of Receivers of Seaboard Air Line Railway to Intervene as Defendants, filed November 24, 1936.

15. Petition of Atlantic Coast Line Railroad Company and Charleston and Western Carolina Railway Company to Intervene as Defendants, filed November 25, 1936.

16. Order Permitting Interstate Commerce Commission to Intervene, filed November 30, 1936.

17. Petition of Marlboro Produce Association to Intervene as a Plaintiff, filed December 1, 1936.

18. Petition of A. J. Mattheson, Inc., to Intervene as Plaintiff, filed December 1, 1936.

19. Order Permitting Receivers of Seaboard Air Line Railway, Atlantic Coast Line Railroad Company, and Charleston and Western Carolina Railway Company to Intervene and Adopt Defendants' Answer, filed December 2, 1936.

20. Order Allowing Marlooro Produce Association and A. J. Mattheson, Inc., to Intervene and Adopt Plaintiffs' Complaint, filed December 3, 1936.

[fol. 365] 21. Opinion of Statutory Three Judge Court, with Findings of Fact and Conclusions of Law, filed January 20, 1937.

22. Decree of Statutory Three Judge Court, filed January 20, 1937.

23. Order Extending Time to Defendants, filed January 20, 1937.

24. Order Extending Time to Defendants, filed February 13, 1937.

25. Petition for Appeal of Defendants.

26. Assignments of Error and Prayer for Reversal.
27. Statement as to Jurisdiction upon Appeal under Rule 12 of Supreme Court of the United States.
28. Order Allowing Appeal.
29. Citation and Service thereof.
30. Statement of the Evidence and Proceedings before the Court, together with Plaintiffs' Exhibits Nos. 3 and 4, and Defendants' Exhibits Nos. 7, 8, 9, 13, 14, and 16, and so much of Defendants' Exhibit No. 10 as is included in the list of exhibits attached to the Statement of Evidence.
31. Cost Bond on Appeal.
32. Praecipe for Transcript of Record.
33. Clerk's Certificate of Transcript of Record.
34. Notice Pursuant to Equity Rule 75.

Thomas W. Davis, Douglas McKay, Solicitors for Atlantic Coast Line Railroad Company, Intervenor; M. G. McDonald, Solicitor for Charleston & Western Carolina Railway Company, Intervenor; J. B. S. Lyles, Solicitor for L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, Intervenors; John M. Daniel, Attorney General of South Carolina; J. Ivey Humphrey, Assistant Attorney General of South Carolina; M. J. Hough, Assistant Attorney General of South Carolina; Eugene S. Blease, Steve C. Griffith, Solicitors for all Original Defendants.

Dated February 23, 1937.

[fol. 366] IN UNITED STATES DISTRICT COURT

APPELLEES' PRÆCIPE FOR RECORD ON APPEAL—Filed March 6, 1937

To the Clerk of the United States District Court for the Eastern District of South Carolina:

Counsel for plaintiffs, appellees in the above cause, request you to include in the Transcript of the Record heretofore requested by the appellants in the above cause by

Præcipe dated February 23, 1937, true copies of the following:

1. That portion of plaintiffs' Exhibit 1, entitled "Apportionment of Federal Aid funds to various states for years 1917 to 1937, inclusive" showing apportionment of Federal Aid funds for South Carolina for each year and the total for the United States as a whole for the entire period.

2. Plaintiffs' Exhibits Nos. 2, 5 and 6.

3. Those portions, shown and copied in attached sheets properly marked for identification, of documents as exhibited at the trial of the cause (original copies of which documents in full are also attached hereto) entitled as follows:

(a) "Act V Uniform Act Regulating Traffic on Highways" prepared and adopted by the National Conference on Street and Highway Safety as published by the Bureau of Public Roads of the Department of Agriculture, 1934.

(b) "Recommendations of the American Society of Automotive Engineers on gross weight and dimensions of motor vehicles adopted in 1933."

(c) "Who Shall Use the Highways and How" published by the American Association of State Highway Officials 1932.

[fol. 367] (d) "Testimony of Thomas H. McDonald, Chief of the Bureau of Public Roads before the Interstate Commerce Commission, December 5, 1931, Docket No. 23,400."

(e) "Report of the Committee on Post Offices and Post Roads to the 67th Congress on June 20, 1921 entitled "Continuation of Federal Aid in the Construction of Highways"."

Respectfully, S. King Funkhouser, J. Ninian Beall, Frank Coleman, Martin P. Burks, III, Solicitors for all Original Plaintiffs.

March 4, 1937.

[fol. 368] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER SETTLING TESTIMONY AND RECORD ON APPEAL—Filed March 10, 1937.

This matter comes before me for the settlement of various minor differences between the parties concerning the evidence to constitute a part of the record on appeal, and particularly as to the inclusion of various matters in this record. All of the original plaintiffs-appellees are represented by S. King Funkhouser, Esq., and Frank Coleman, Esq., and all of the defendants-appellants by Steve C. Griffith, Esq., and J. B. S. Lyles, Esq.

I conclude and order as follows:

As to the Exhibits: Plaintiffs' Exhibits numbered two, three, four and eleven, and defendants' Exhibits numbered eight, nine, ten, thirteen, fourteen and sixteen are to be included in the list of exhibits appended to the statement of evidence and printed as a part thereof, in the form, as to all such Exhibits, that the same have now been attached to the original statement of the evidence, as agreed to by the parties. Plaintiffs' Exhibits numbered five and six, and defendants' Exhibit numbered seven are maps, which are to be attached to the record as exhibits, forty copies of each thereof to be furnished the Clerk as required.

[fol. 369] As to the third section of appellees' præcipe for record on appeal—appellees ask that portions of certain documents exhibited at the trial of the case, and concerning which the Court took judicial notice, be printed as an appendix to the evidence. The portions desired to be so included by appellees have been typewritten and attached to their original præcipe, the original printed copies of the documents being filed therewith. In the circumstances, I find that the request of appellees in this respect is reasonable, and the same is granted. Such portions so desired to be printed by appellees have been, by agreement of counsel, actually attached as an appendix to the statement of evidence, and the Clerk will certify them in that form.

As to the statement of evidence filed by appellants pursuant to Equity Rule 75, I find that the same is true, complete and properly prepared. A substantial portion of the testimony has been reproduced in the exact words of the witnesses but I find it is not reasonably possible to sum-

marize this testimony or otherwise to convey the true and exact meaning of the witnesses. Hence, this meets with my approval and I approve the statement of the evidence as now filed, which includes such changes as the parties have made in the original statement by agreement, and direct that the same shall constitute a part of the record for appeal.

J. Lyles Glenn, United States District Judge for the Eastern District of South Carolina.

March 10, 1937.

[fol. 370] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE PURSUANT TO EQUITY RULE 75—Filed February 25, 1937

To S. King Funkhouser, J. Ninian Beall, Frank Coleman, L. Mendel Rivers, Thomas M. Ross, Edward M. Reidy, Daniel W. Knowlton, S. S. Tison, Esquires, Solictors for Plaintiffs-Appellees:

You will please take notice that the defendants-appellants have lodged their statement of the evidence and proceedings before the Court with the Clerk of the District Court of the United States for the Eastern District of South Carolina, at Charleston, South Carolina, a copy of the same being hereby served upon you, pursuant to Equity Rule 75, and will move the Honorable J. Lyles Glenn, United States District Judge for the Eastern District of South Carolina, to approve the same, at his Chambers in the Federal Court Room in the City of Columbia, South Carolina, on the 10th day of March, 1937, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard.

Steve C. Griffith, Thomas W. Davis, Douglas McKay, M. G. McDonald, J. B. S. Lyles, Solicitors for Defendants-Appellants. John M. Daniel, Attorney General of South Carolina; J. Ivey Humphrey, Assistant Attorney General of South Carolina; M. J. Hough, Assistant Attorney General of South Carolina; Eugene S. Blease, of Counsel.

February 23, 1937

[fols. 371-379] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 380] Citation in usual form omitted in printing.

[fol. 381] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER EXTENDING TIME TO FILE RECORD—Filed May 4, 1937

On motion of Steve C. Griffith, Esq., Solicitor for all the original defendants-appellants, and J. B. S. Lyles, Esq., Solicitor for all intervening defendants-appellants, and upon due consideration, good cause having been shown therefor;

It is ordered That the time within which appellants may docket this case and file the record thereof on the appeal with the Clerk of the Supreme Court of the United States be and the same is hereby enlarged and extended until and including the twenty-third day of June, 1937, this constituting an enlargement of forty days of the time now current, which would otherwise expire on the fourteenth day of May, 1937.

J. Lyles Glenn, United States District Judge for the Eastern District of South Carolina.

Columbia, S. C., May 4th, 1937.

[fols. 382-384] Order extending time to file record to May 14, 1937, and notices omitted in printing.

[fol. 385] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

POINTS RELIED ON AND PARTS OF RECORD NECESSARY FOR CONSIDERATION THEREOF—Filed June 22, 1937

Come Now the Appellants and adopt their assignments of error as their statement of the points to be relied upon and represent that the following portions of the record filed in this cause are necessary for consideration of the points relied upon by the Appellants, and that the following, constituting the transcript of the record, should be printed by the Clerk:

1. Bill of Complaint, filed August 11, 1936, omitting subpœna.

2. Defendants' Motion to Dismiss, filed September 19, 1936.

3. Memorandum Opinion of District Judge Upon Motion to Dismiss, filed October 24, 1936.

4. Order Granting Defendants' Motion to Dismiss as to certain paragraphs of Complaint, filed November 2, 1936.

5. Order Overruling Defendants' Motion to Dismiss as to Paragraph 9 of Bill of Complaint, filed November 2, 1936.

6. Plaintiffs' Motion for Temporary Injunction, filed November 2, 1936.

7. Order Permitting the filing of Motion for Temporary Injunction, filed November 2, 1936.

8. Memorandum Opinion on Motion for Temporary Injunction, Filed November 2, 1936.

9. Temporary Restraining Order, filed November 2, 1936.

10. Answer, filed November 7, 1936.

11. Order Convening Statutory Three Judge Court, filed November 13, 1936.

[fol. 386] 12. Defendants' Motion to Dismiss Complaint, filed November 24, 1936.

13. Order Permitting Interstate Commerce Commission to Intervene, filed November 30, 1936.

14. Order Permitting Receivers of Seaboard Air Line Railway Company, Atlantic Coast Line Railroad Company, and Charleston and Western Carolina Railway Company to Intervene and Adopt Defendants' Answer, filed December 2, 1936.

15. Order Allowing Marlboro Produce Association and A. J. Mattheson, Inc., to Intervene and Adopt Plaintiffs' Complaint, filed December 3, 1936.

16. Opinion of Statutory Three Judge Court, with Findings of Fact and Conclusions of Law, filed January 20, 1937.

17. Decree of Statutory Three Judge Court, filed January 20, 1937.

18. Order Extending Time to Defendants, filed January 20, 1937.

19. Order Extending Time to Defendants, filed February 13, 1937.

20. Petition for Appeal of Defendants.

21. Assignments of Error and Prayer for Reversal.

22. Statement as to Jurisdiction upon Appeal under Rule 12 of Supreme Court of the United States.

23. Order Allowing Appeal.

24. Citation and Service thereof.

25. Statement of the Evidence and Proceedings before the Court, together with Plaintiffs' Exhibits Nos. 3 and 4, and Defendants' Exhibits Nos. 7, 8, 9, 13, 14 and 16, and so much of Defendants' Exhibit No. 10 as is included in the list of exhibits attached to the Statement of Evidence.

26. Cost Bond on Appeal.

27. Præcipe for Transcript of Record.

28. Order Settling Testimony and Record on Appeal, [fol. 387] signed by Judge Glenn, dated March 10, 1937.

29. Order Extending Time to Docket Case to May 14, 1937, taken under Rule 11 of the Supreme Court, signed by Judge Glenn, dated March 12, 1937.

30. Acknowledgments of Service of Order Settling Testimony and Record on Appeal, signed by Judge Glenn, dated March 10, 1937, and Order Extending Time to Docket Case to May 14, 1937, taken under Rule 11 of the Supreme Court, signed by Judge Glenn, dated March 12, 1937.

31. Order Enlarging Time to Docket Case to June 23, 1937, taken under Rule 11 of the Supreme Court.

32. Acknowledgments of Service of Order Enlarging Time to Docket Case to June 23, 1937, taken under Rule 11 of the Supreme Court.

33. Clerk's Certificate of Transcript of Record.

34. Notice Pursuant to Equity Rule 75.

35. Points Relied on and Parts of Record Necessary for consideration thereof.

Thomas W. Davis, Douglas McKay, Solicitors for Atlantic Coast Line Railroad Company, Intervenor. M. G. McDonald, Solicitor for Charleston & Western Carolina Railway Company, Intervenor. J. B. S. Lyles, Solicitor for L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company, Intervenors. John M. Daniel, Attorney General of South Carolina; J. Ivey Humphrey, Assistant Attorney General of South Carolina; M. J. Hough, Assistant Attorney General of South Carolina; Eugene S. Blease, Steve C. Griffith, Solicitors for all Original Defendants.

Dated June 4, 1937.

[fol. 388] I acknowledge receipt of copy of Points Relied on and Parts of Record Necessary for Consideration Thereof in the above entitled cause.

This 7 day of June, 1937.

E. M. Reidy, Attorney for Appellee, Interstate Com-
[fol. 389] merce Commission. J. Ninian Beall, At-
[fol. 390] torney for Appellee, Barnwell Bros., Inc. Tison & Miller, Attorneys for Marlboro Produce Association and A. J. Mattheson, Inc., Ap-
[fol. 391] pellees. S. King Funkhouser, Attorney for Appellees.

[fol. 392] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

DESIGNATION BY APPELLEES OF ADDITIONAL MATERIAL PARTS OF RECORD—Filed June 29, 1937

Come Now the Appellees and request that the following additional parts of the record filed in this cause and necessary for the consideration of this case on appeal, should be printed by the clerk:

1. That portion of plaintiffs' Exhibit 1, entitled "Apportionment of Federal Aid funds to various states for years 1917 to 1937, inclusive" showing apportionment of Federal Aid funds for South Carolina for each year and the total for the United States as a whole for the entire period.

2. Plaintiffs' Exhibits Nos. 2, 5, and 6.

3. Those portions of documents as exhibited in the trial of the case, shown and copied in sheets attached to appellees' praecipe, and properly marked for identification (original copies of which documents in full are also attached to appellees' praecipe) entitled as follows:

(a) "Act V uniform Act Regulating Traffic on Highways" prepared and adopted by the National Conference on Street and Highway Safety as published by the Bureau of Public Roads of the Department of Agriculture, 1934.

(b) "Recommendations of the American Society of Automotive Engineers on gross weight and dimensions of motor vehicles adopted in 1933."

[fol. 393] (c) "Who Shall Use the Highways and How" published by the American Association of State Highway Officials 1932.

(d) "Testimony of Thomas H. McDonald, Chief of the Bureau of Public Roads before the Interstate Commerce Commission, December 5, 1931, Oocket No. 23,400."

(e) "Report of the Committee on Post Offices and Post Roads to the 67th Congress on June 20, 1921 entitled 'Continuation of Federal Aid in the Construction of Highways'."

4. Petition of Interstate Commerce Commission to Intervene as a Plaintiff, filed November 17, 1936.

5. Petition of Receivers of Seaboard Air Line Railway to Intervene as Defendants, filed November 24, 1936.

6. Petition of Atlantic Coast Line Railroad Company and Charleston and Western Carolina Railway Company to Intervene as Defendants, filed November 25, 1936.

7. Petition of Marlboro Produce Association to Intervene as a Plaintiff, filed December 1, 1936.

8. Petition of A. J. Mattheson, Inc., to Intervene as Plaintiff, filed December 1, 1936.

9. Appellees' Counter Request entitled "Additional Material Parts of Record."

Respectfully submitted, S. King Funkhouser, J. Ninian Beall, Frank Coleman, Martin P. Burks, III, Solicitors for all Original Plaintiffs.

June 19. 1937.

[fol. 394] The undersigned hereby accepts service and acknowledges receipt of a copy of Appellees' counter-request entitled Additional Material Parts of Record, dated June 19th, 1937.

Executed this 21st day of June, 1937.

J. B. S. Lyles, Attorney for Intervening Appellants.

[fol. 395] Steve C. Griffith Attorney for Appellants.

[fol. 396] Thos. W. Davis Attorney for Appellants.

[fol. 397] IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AND ADDITION TO RECORD—Filed July 13, 1937

It appearing to Counsel of record:

That at the trial of this cause the Appellees introduced in evidence, as their Exhibits 5 and 6, two maps, one marked "The Federal Aid Highway System—Progress Map, Corrected to May 1, 1936", a publication of the Department of Agriculture, Bureau of Public Roads (2 sheets), and one marked "United States System of Highways—Adopted for Uniform Marking by the American Association of State Highway Officials, November 11, 1936, corrected to July 1, 1935", a publication of the Department of Agriculture, Bureau of Public Roads (1 sheet);

That these two exhibits were included in the Appellees præcipe directed to the Clerk of the District Court;

That by the decree of the District Court dated —— —, ——, settling the record for appeal, it was ordered that the Clerk of said Court certify said Exhibits 5 and 6 along with other portions of the record in the cause and that the parties hereto furnish the said Clerk with 40 copies of each of said exhibits;

That 40 copies of said exhibits were accordingly furnished said Clerk, but;

That the said Clerk failed to certify copies of said exhibits to the Supreme Court of the United States along with other portions of the record, although 40 copies of said exhibits accompanied the certified record to the Supreme Court of the United States;

[fol. 398] That in their statement of Additional Material Parts of Record filed with the Clerk of the Supreme Court of the United States, Appellees requested that said Exhibits 5 and 6 be printed along with other portions of the record, but;

That the Clerk of the Supreme Court of the United States is unable to comply with this direction since he has no certified copy of either of said exhibits.

Now, Therefore, in consideration of the foregoing it is agreed and stipulated between the undersigned counsel of record in this cause that the necessity for procedure to

establish a dimunition of the record shall be and it is hereby waived, and the undersigned counsel of record do hereby request the Clerk of the District Court for the Eastern District of South Carolina to certify one copy of each of said exhibits, plaintiffs' exhibits Nos. 5 and 6, to the Clerk of the Supreme Court of the United States in order that the record in this cause may be complete.

Thos. W. Davis, J. B. S. Lyles, Solicitor- for all Intervening Defendants. S. King Funkhouser, Solicitor for all Original Plaintiffs-Appellees. Thomas M. Ross, Solicitor for Interstate Commerce Commission. Tison & Miller, Solicitors for Marlboro Produce Assn. and A. J. Matheson, Inc. John M. Daniel, Attorney General; J. Ivey Humphrey, Assistant Attorney General; M. J. Hough, Assistant Attorney General; Eugene S. Blease, Steve C. Griffith, Solicitors for all Original Defendants.

[fol. 398½] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

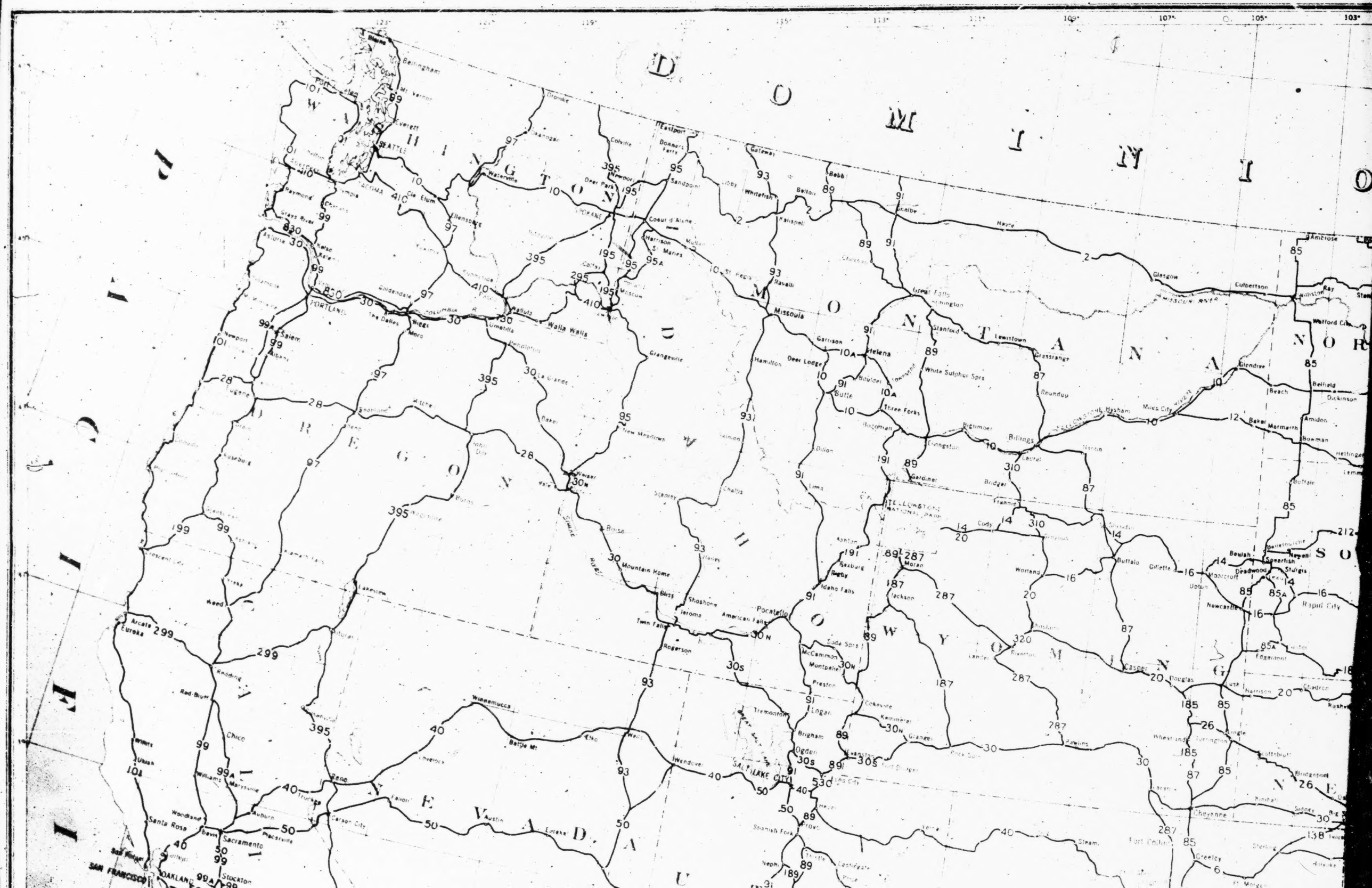
CERTIFICATE

I, Richard W. Hutson, Clerk of the Court aforesaid, do certify that the maps hereto attached are true copies of the original Exhibits 5 and 6 in the case of Barnwell Brothers, Inc., et al., Complainants, vs. South Carolina Highway Department et al., Defendants, the said Exhibits 5 and 6 being put in evidence by and on behalf of Complainants, which original Exhibits 5 and 6 are now on file and of record in the Clerk's office of said Court.

Witness my official signature and seal of office at Charleston, S. C., the 7th day of July, 1937.

Richard W. Hutson, C., D. C. U. S., E. D. S. C. (Seal United States District Court, Eastern District, So. Ca.)

(Here follow 2 Maps, Exhibits 5 and 6, side folios 399 and 400)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WYOMING
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SEATTLE
PORTLAND
SPOKANE
SALT LAKE CITY
SAN FRANCISCO
OAKLAND
Sacramento
Reno
Boise
Billings
Great Falls
Missoula
Helena
Butte
Bozman
Cheyenne
Rapid City
Minot
Glasgow
Havre
Williston
Dickinson
Bismarck
Fargo
Grand Forks
Watford City
Glendive
Miles City
Lewistown
Casper
Laramie
Rock Springs
Pocatello
Idaho Falls
Twin Falls
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Everett
Tacoma
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Kelso
Astoria
Salem
Eugene
Roseburg
Medford
Klamath Falls
Lakeview
Burns
Ontario
La Grande
Baker
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Lewiston
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Salmon
Challis
Stanley
Mountain Home
Burley
Rexburg
Jackson
Moran
Afton
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Kemmerer
Cokeville
Montpelier
Soda Springs
Preston
Tremonton
Brigham
Wendover
Battle Mt
Winnemucca
Elko
Ely
Austin
Eureka
Tonopah
Hawthorne
Fallon
Carson City
Truckee
Auburn
Placerville
Stockton
Modesto
Merced
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Hanford
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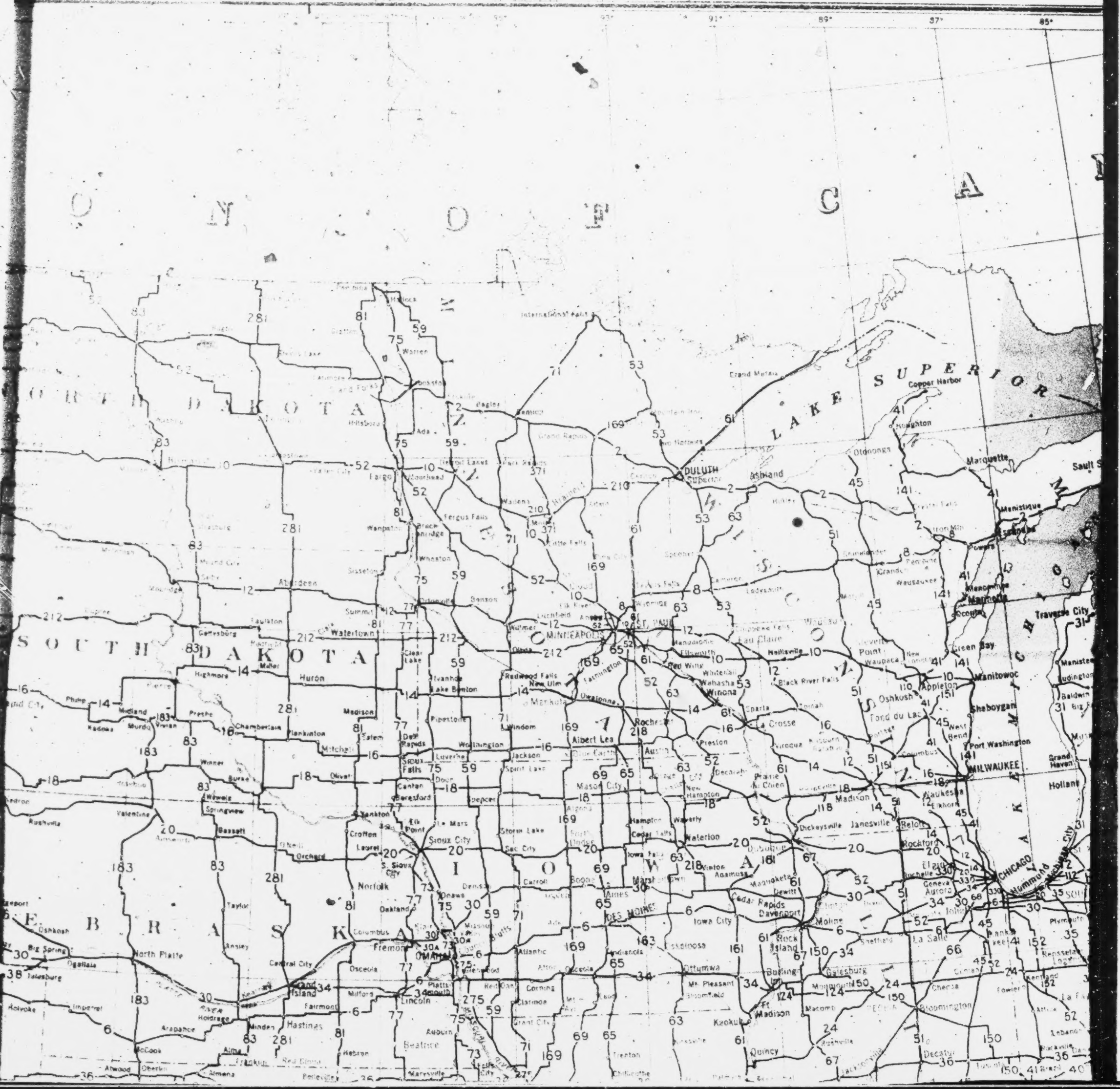
Salinas
Monterey
Santa Cruz
San Jose
Santa Rosa
Ukiah
Willits
Fort Bragg
Eureka
Arcata
Crescent City
Weed
Redding
Red Bluff
Chico
Oroville
Marysville
Woodland
Davis
Vallejo
Richmond
Berkeley
San Rafael
Petaluma
Napa
Sonoma
Mt Vernon
Port Angeles
Port Townsend
Shelton
Raymond
Chehalis
Centralia
Kelso
Longview
Kalama
Castle Rock
Stevenson
White Salmon
Hood River
The Dalles
Biggs
Moro
Condon
Arlington
Heppner
Ione
Boardman
Hermiston
Umatilla
Pasco
Kennewick
Prosser
Sunnyside
Toppenish
Goldendale
Ellensburg
Cle Elum
Leavenworth
Wenatchee
Chelan
Omak
Oroville
Tonasket
Republic
Colville
Chewelah
Newport
Priest River
Sandpoint
Bonners Ferry
Libby
Troy
Eureka
Whitefish
Kalispell
Columbia Falls
West Glacier
Polson
Ronan
Plains
Thompson Falls
Superior
Alberton
Missoula
Hamilton
Darby
Stevensville
Florence
Lolo
Deer Lodge
Anaconda
Philipsburg
Drummond
Garrison
Boulder
Whitehall
Three Forks
Manhattan
Belgrade
Livingston
Gardiner
Big Timber
Columbus
Laurel
Billings
Hardin
Crow Agency
Lodge Grass
Wolf Point
Culbertson
Scobey
Plentywood
Froid
Poplar
Fort Peck
Jordan
Winnett
Roundup
Harlowton
Lewistown
Stanford
Great Falls
Conrad
Shelby
Cut Bank
Browning
Chester
Havre
Malta
Glasgow

303 US 177 U.S. Sup. Ct. Records, Briefs 1937
S. C. Hwy. Dept. v. Barnwell Bros. No. 161

In Evidence, Compl'ts'
Richard W. Hutson, C., D. C. U.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Grand Forks
Fargo
Moorhead
Minot
Bismarck
Aberdeen
Watertown
Huron
Sioux Falls
Yankton
Sioux City
Norfolk
Fremont
Omaha
Lincoln
Grand Island
North Platte
Hastings
Kearney
Rapid City
Pierre
Mitchell
Brookings
Mankato
Rochester
Albert Lea
Austin
Mason City
Fort Dodge
Waterloo
Cedar Rapids
Davenport
Iowa City
Des Moines
Ottumwa
Burlington
Keokuk
Quincy
Rock Island
Moline
Galesburg
Peoria
Bloomington
Decatur
Springfield
Champaign
Danville
Rockford
Janesville
Madison
Green Bay
Appleton
Oshkosh
Fond du Lac
Manitowoc
Sheboygan
Milwaukee
Racine
Kenosha
Waukegan
Joliet
Aurora
Elgin
Gary
Hammond
Michigan City
La Porte
South Bend
Elkhart
Fort Wayne
Kalamazoo
Battle Creek
Jackson
Ann Arbor
Detroit
Flint
Saginaw
Bay City
Grand Rapids
Muskegon
Traverse City
Petoskey
Mackinaw City
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Marquette
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Hayward
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Grand Marais
Thief River Falls
Crookston
Bemidji
Brainerd
Detroit Lakes
Fergus Falls
Wadena
Little Falls
Willmar
Redwood Falls
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Luverne
Pipestone
Canton
Beresford
Watertown
Clear Lake
Ivanhoe
Lake Benton
Madison
Dell Rapids
Sioux Falls
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Chamberlain
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Lemmon
Mobridge
Aberdeen
Sisseton
Wahpeton
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Williston
Dickinson
Bismarck
Mandan
Hettinger
Lemmon
Gettysburg
Faulkton
Miller
Highmore
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Lusk
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Casper
Riverton
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Cheyenne
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Chadron
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EXHIBIT No. 5
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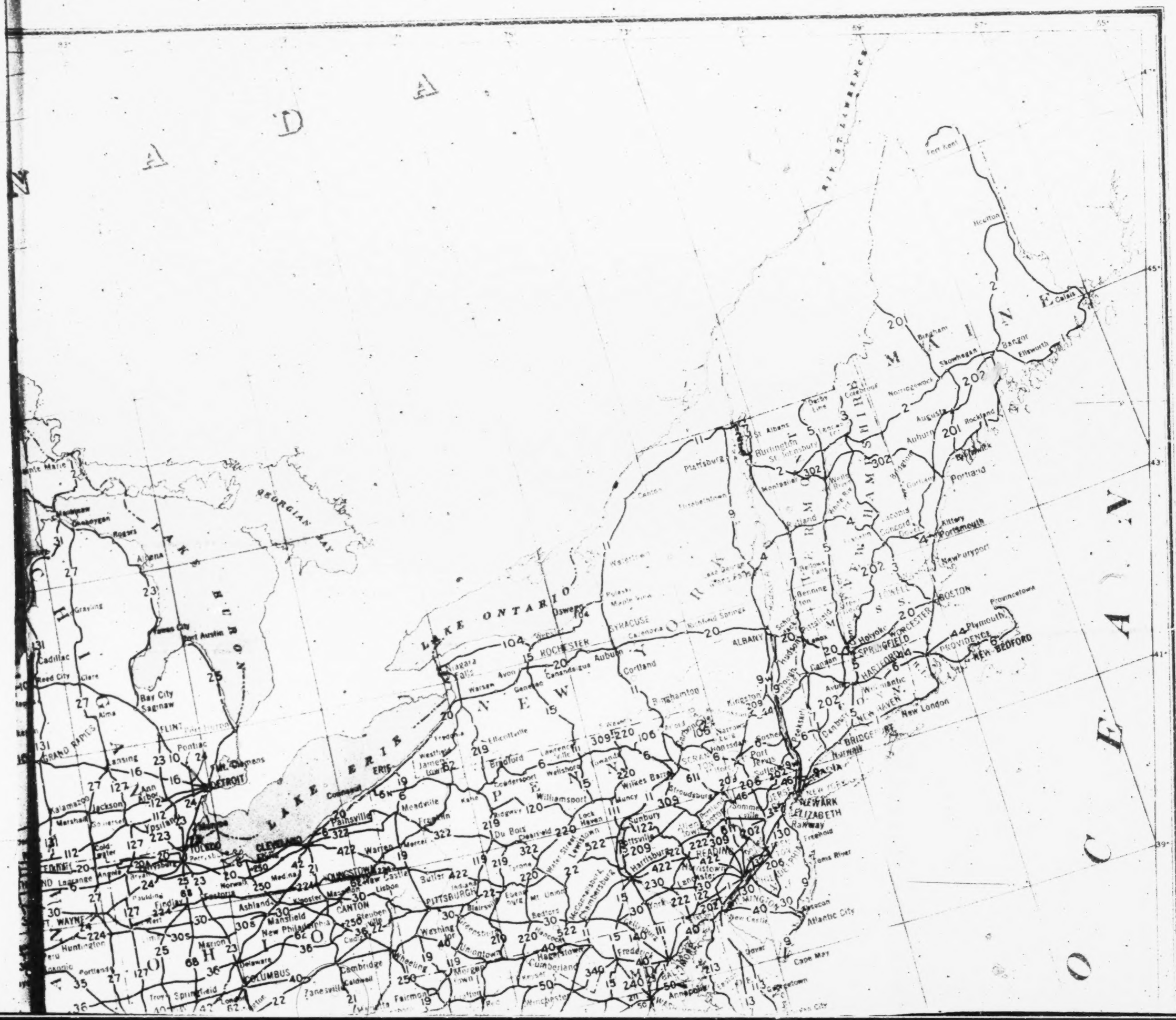

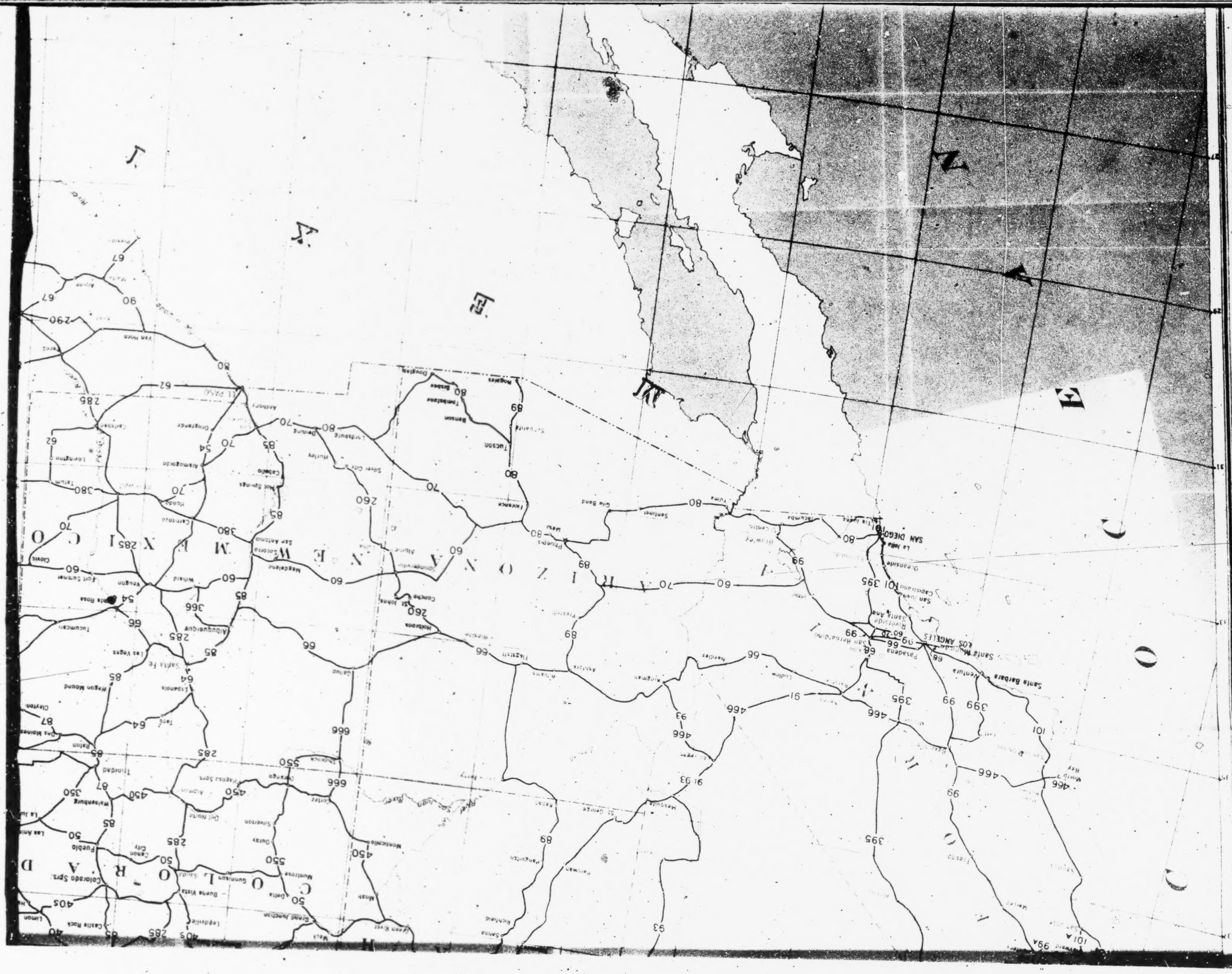
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Childress
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Dalhart
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Borger
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Denison
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Little Rock
Pine Bluff
Monticello
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Jennings
Abbeville
New Iberia
Houma
Morgan City
Thibodaux
Gulfport
Biloxi
Pascagoula
Mobile
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Fort Walton Beach
Panama City
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Valdosta
Albany
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Jasper
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Rogers
Bentonville
Harrison
Mountain Home
Batesville
Jonesboro
Blytheville
Paragould
Poplar Bluff
Cape Girardeau
Sikeston
Kennett
Dyersburg
Union City
Jackson
Humboldt
Brownsville
Somerville
Bolivar
Corinth
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Vicksburg
Natchez
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Bogalusa
Covington
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Baton Rouge
Plaquemine
Donaldsonville
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DeRidder
Leesville
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Natchitoches
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Pineville
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Jonesboro
Ruston
Minden
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Bossier City
Benton
Arcadia
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Magnolia
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Poplar Bluff
Doniphan
Ellington
Salem
Rolla
Waynesville
Lebanon
Springfield
Joplin
Carthage
Neosho
Monett
Aurora
Mountain Grove
West Plains
Willow Springs
Houston

DEPARTMENT OF AGRICULTURE
HENRY A. WALLACE, SECRETARY
BUREAU OF PUBLIC ROADS
THOMAS H. MACDONALD, CHIEF

UNITED STATES

RE
RY

TES
HWAYS

Population of Cities and Towns

100,000 and over . . WASHINGTON
10,000 to 99,999 . . Morgantown
Under 10,000 . . . . Waynesburg

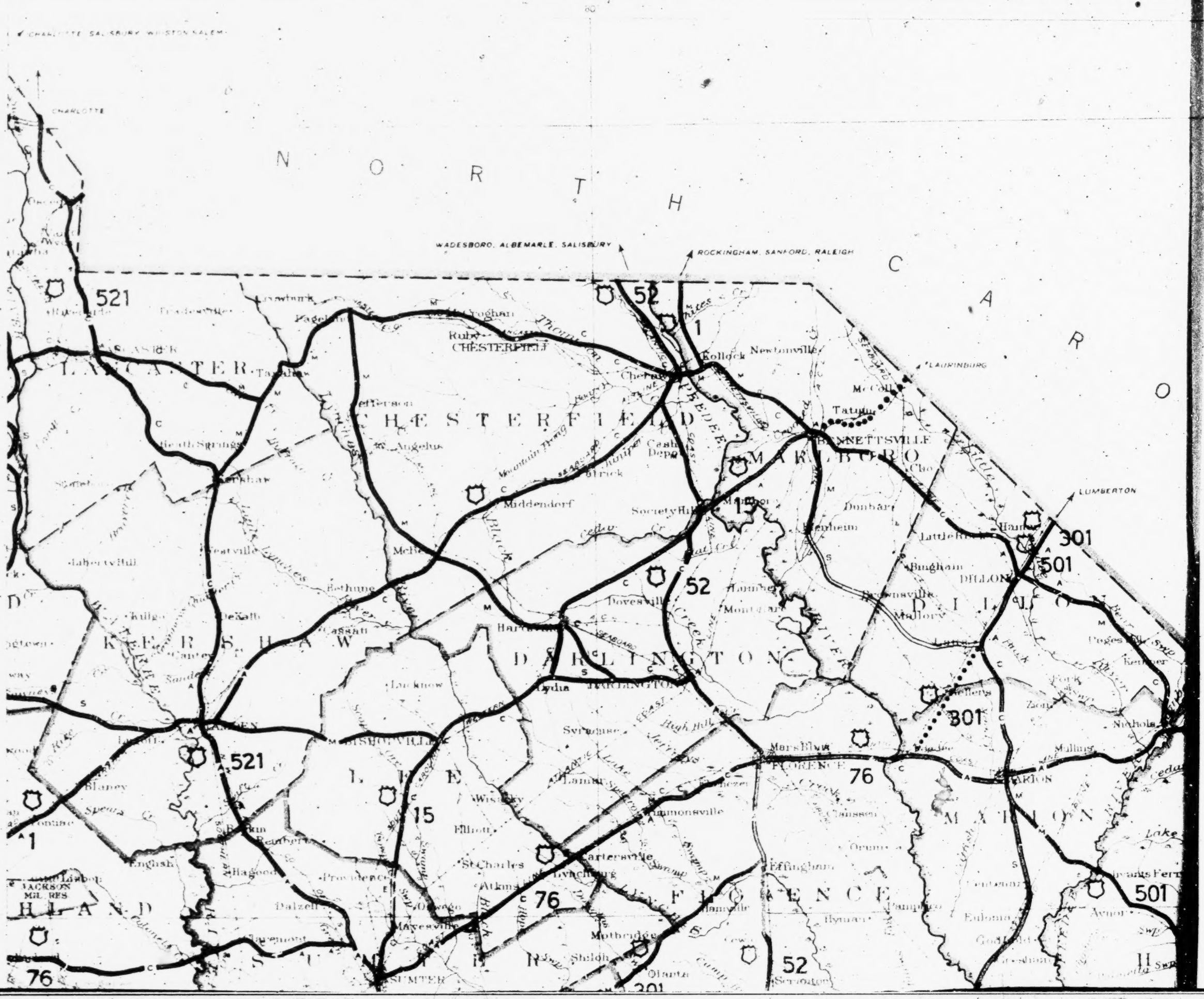
NOTE

The roads shown hereon indicate routes designated by the American Association of State Highway officials to be systematically numbered, as approved by the Secretary of Agriculture. They are not in all cases yet constructed, nor have the detailed locations been determined.

DEPARTMENT OF AGRICULTURE
BUREAU OF PUBLIC ROADS

THE FEDERAL AID HIGHWAY SY

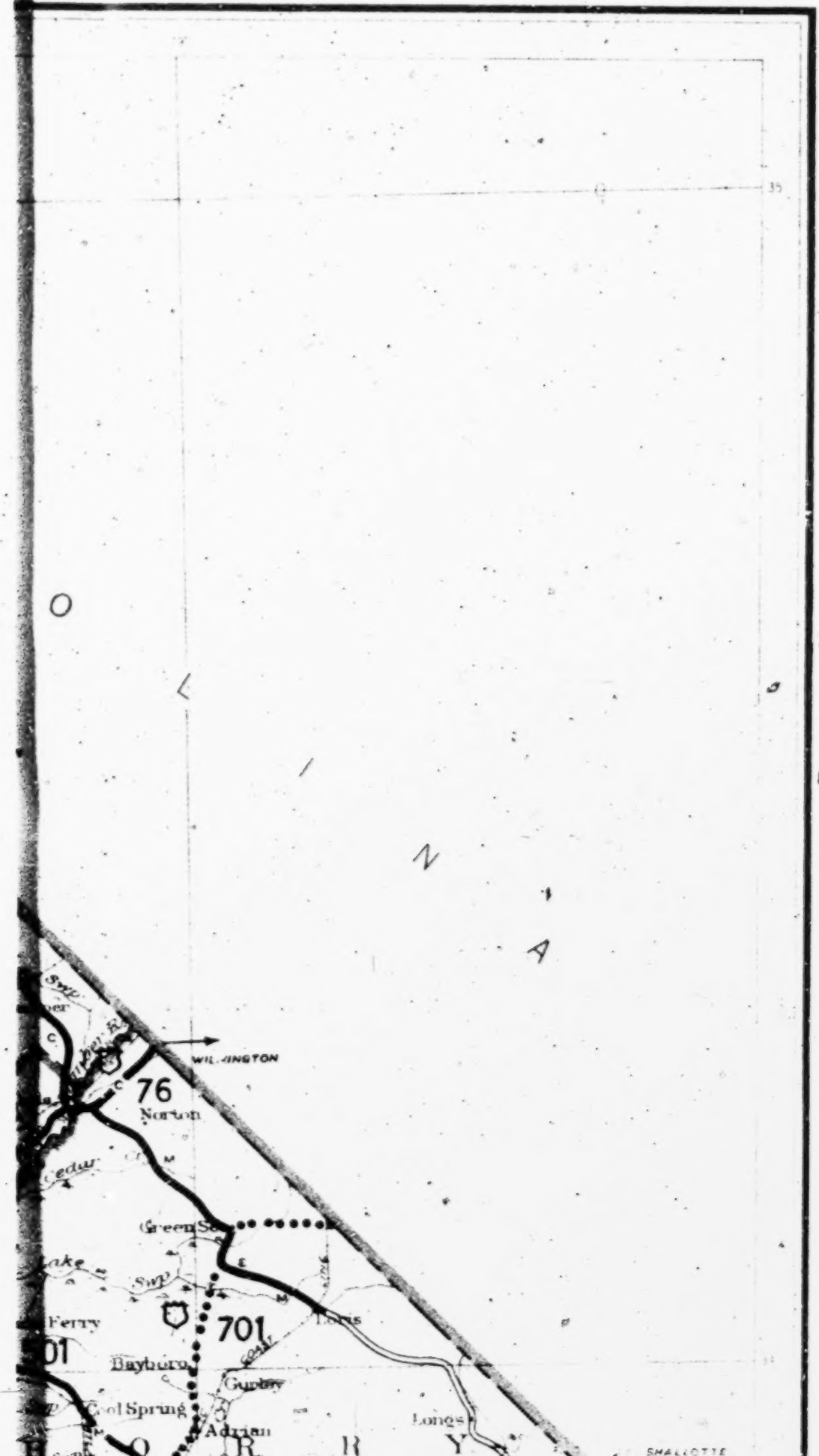
PROGRESS MAP

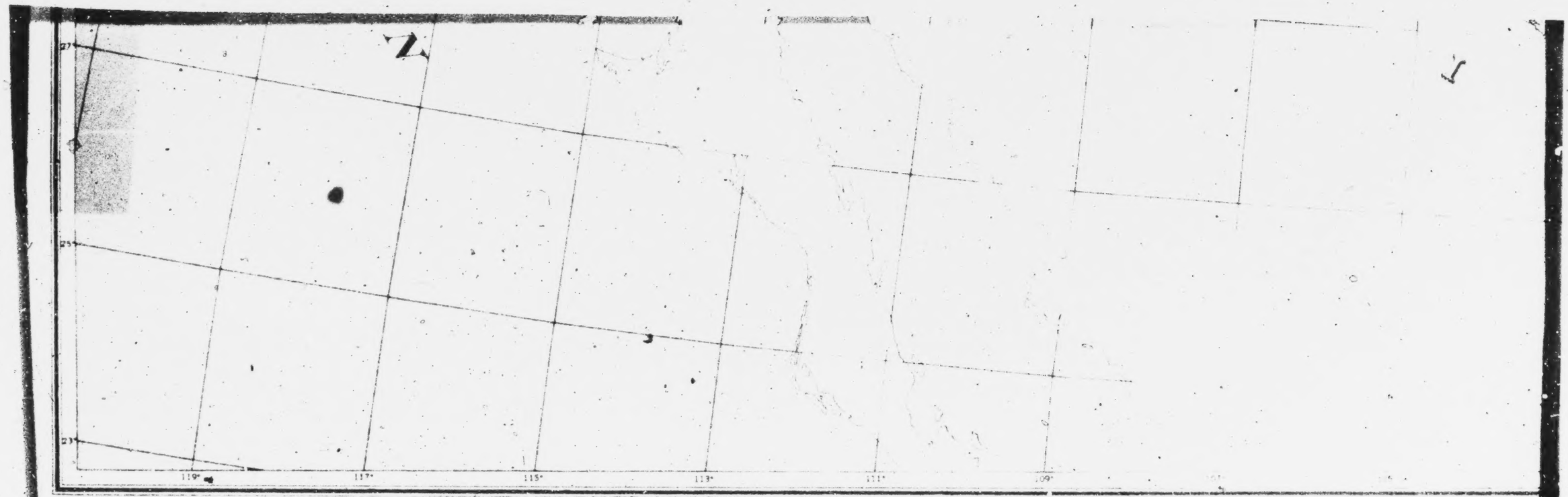


SYSTEM

In Evidence, Compl'ts' Exhibit No. 6 300B
Richard W. Hutson, C., D. C. U. S:, E. D. S. C. 12/1/36

EASTERN SOUTH CAROLINA

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115°
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111°
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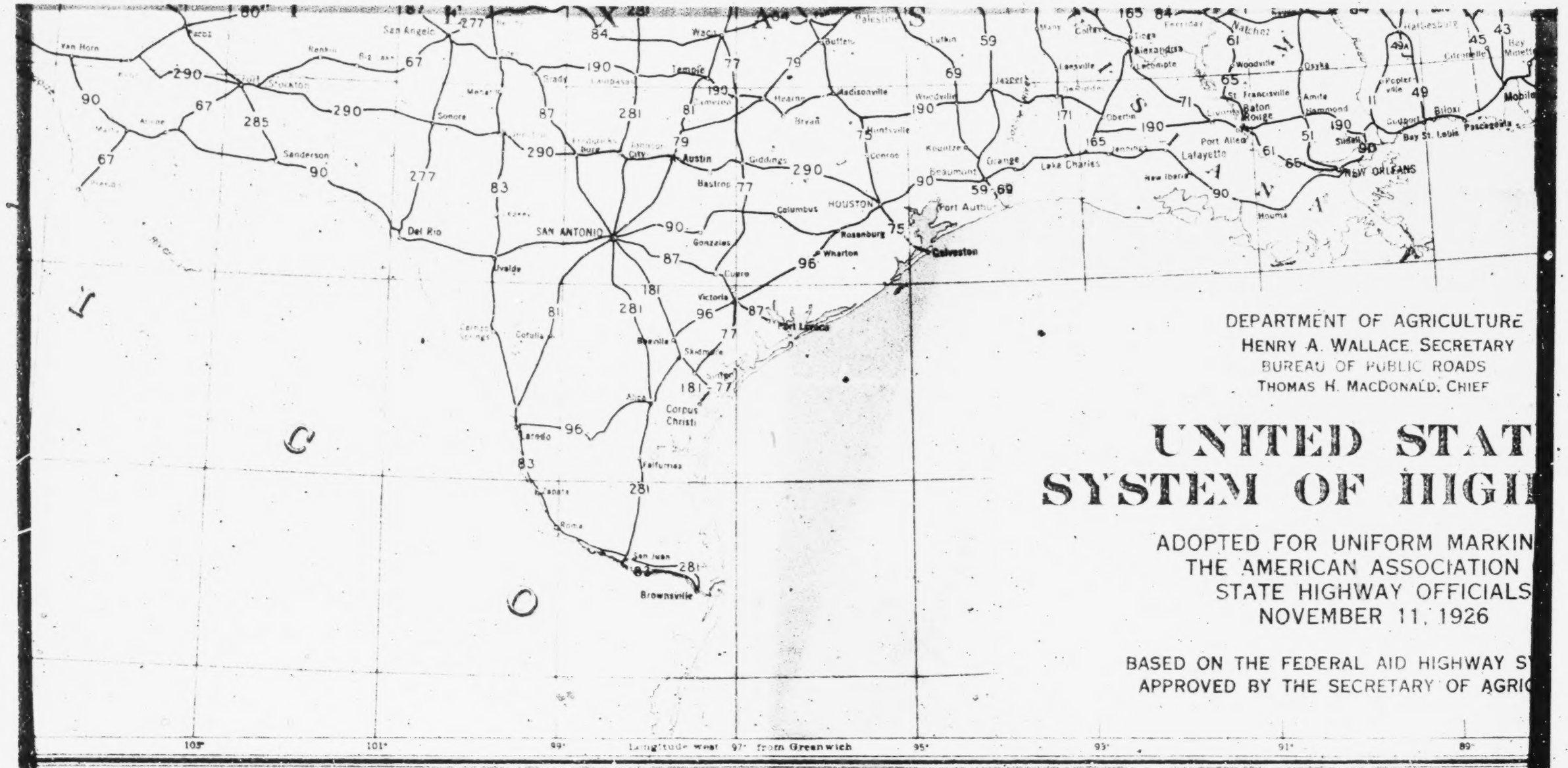
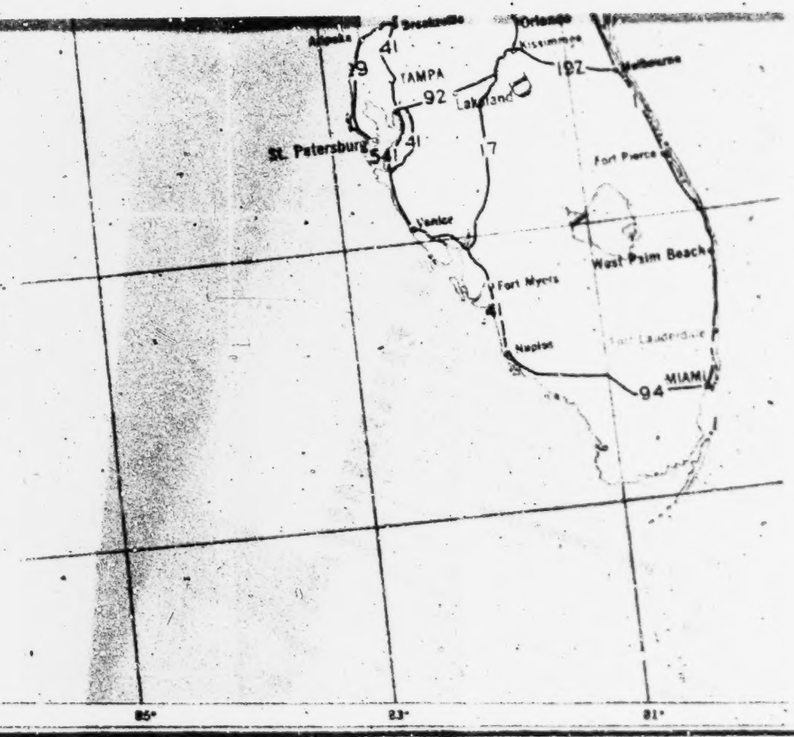

DEPARTMENT OF AGRICULTURE
HENRY A. WALLACE, SECRETARY
BUREAU OF PUBLIC ROADS
THOMAS H. MACDONALD, CHIEF
UNITED STAT
SYSTEM OF HIGH
ADOPTED FOR UNIFORM MARKIN
THE AMERICAN ASSOCIATION
STATE HIGHWAY OFFICIALS
NOVEMBER 11, 1926
BASED ON THE FEDERAL AID HIGHWAY S
APPROVED BY THE SECRETARY OF AGRIC
SAN ANTONIO
HOUSTON
Galveston
NEW ORLEANS
Austin
Del Rio
Brownsville
Corpus Christi
Port Lavaca
Longitude west 97° from Greenwich

NT OF AGRICULTURE
WALLACE, SECRETARY
OF PUBLIC ROADS
H. MACDONALD, CHIEF

D STATES
OF HIGHWAYS

UNIFORM MARKING BY
CAN ASSOCIATION OF
GHWAY OFFICIALS
MBER 11, 1926

ERAL AID HIGHWAY SYSTEM AS
SECRETARY OF AGRICULTURE



Population of Cities and Towns

100,000 and over . . . WASHINGTON
10,000 to 99,999 . . . Morgantown
Under 10,000 . . . Waynesburg

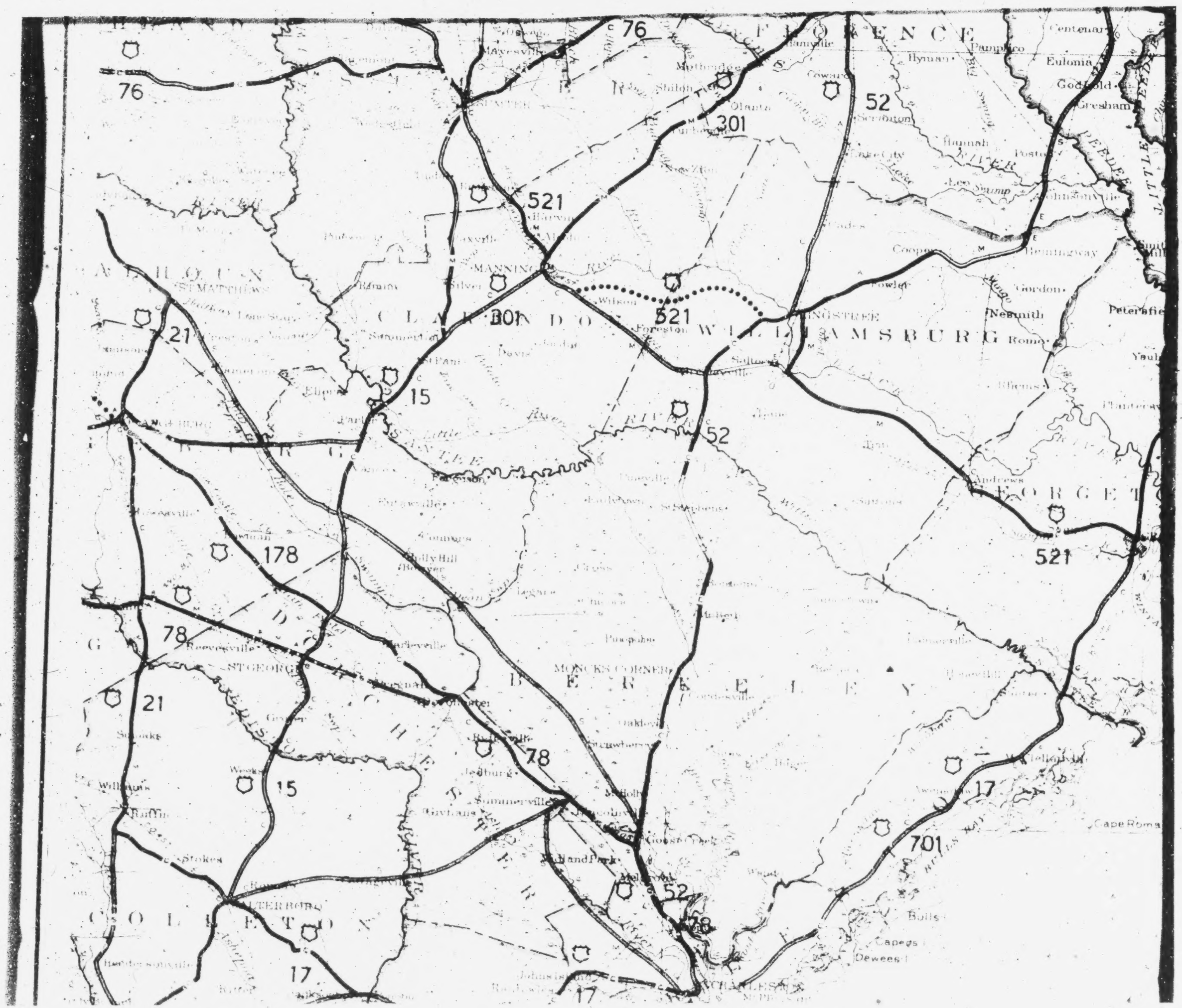
NOTE

The roads shown hereon indicate routes designated by the American Association of State Highway officials to be systematically numbered, as approved by the Secretary of Agriculture. They are not in all cases yet constructed, nor have the detailed locations been determined.

STATUTE MILES

——— United States Highways

Corrected to July 1, 1935



76
76
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301
521
521
301
521
21
15
52
178
521
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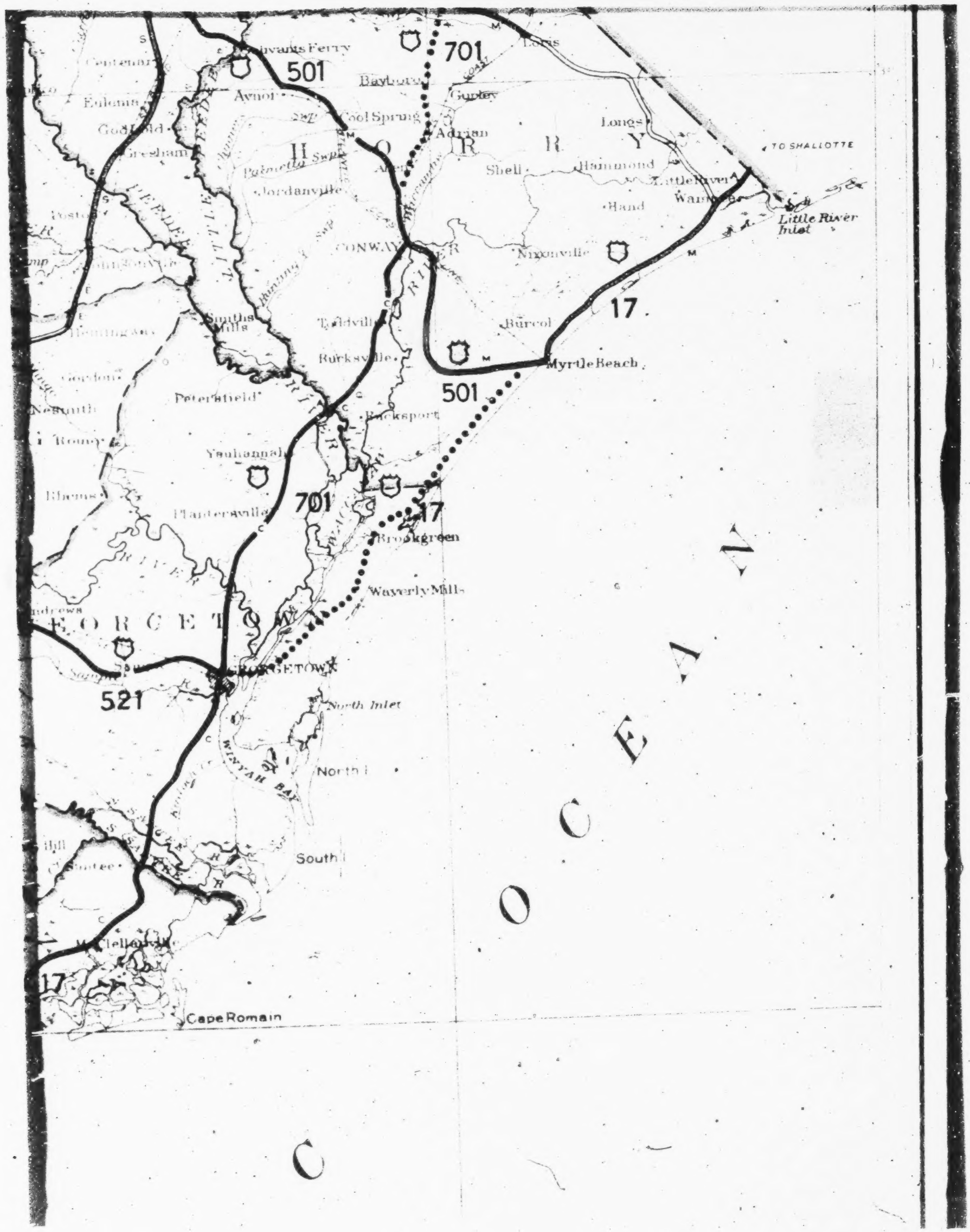
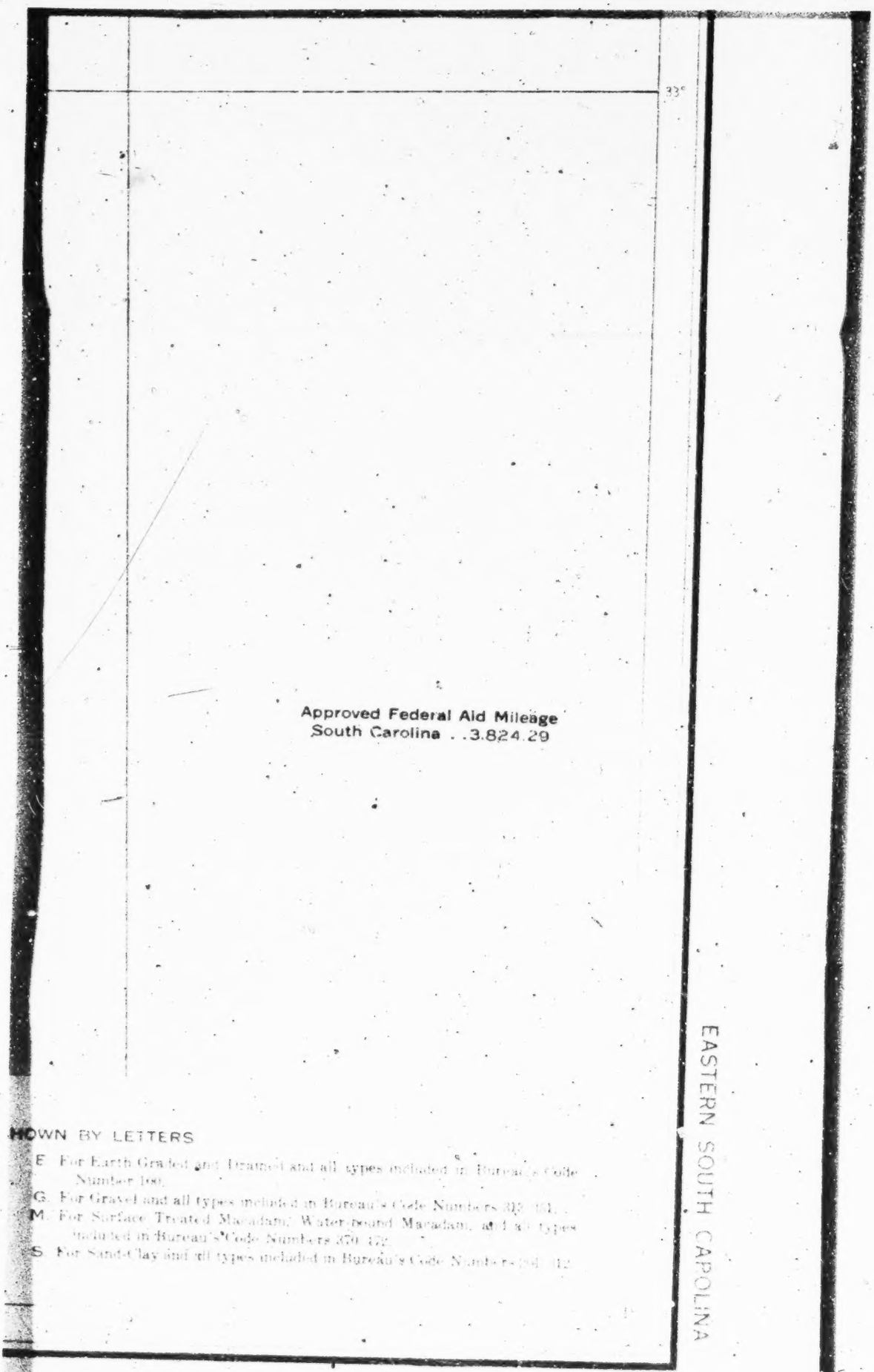
21
78
15
17
701
52
78
17
17
FLORENCE
CLARENDON
WILLIAMSBURG
GEORGETOWN
BERKELEY
COLLETON
SUMTER
MANNING
KINGSTREE
ST MATTHEWS
ST GEORGE
MONCKS CORNER
Summerville
Jedburg
Goose Creek
Mt Holly
Cape Roma
Bulls
Capers
Dewees
Andrews
Nesmith
Gordon
Hemingway
Johnsonville
Hannah
Lake City
Scranton
Olanta
Mayesville
Pamplico
Eulonia
Gresham
Centenar
Peterslie
Yaul
Plantersv
Cooper
Fowler
Cades
Coward
Hyman
Shiloh
Mulbridge
Wilson
Foreston
Salters
Davis
Summerton
Elliott
Parker
Ferguson
Eutawville
Connors
Holly Hill
Bowyer
Legare
Cross
Pineville
Eadytown
St Stephens
Pinopolis
Cordesville
Oakley
Strawberry
Reevesville
Harleyville
Ridgeville
Givhans
Williams
Ruffin
Stokes
Weeks
Gruver
Rowers
Ashepoo
Johns Island
Randolph
Wando
Hamville
Oswego
Turbeville
Harvin
Paxville
Silver
Rimini
Lone Star
Creston
Cameron
Lynchburg
Pinewood
Wedgefield
Dorchester
Ridgeville
Cape Roma
Bulls
Capers
Dewees
Henderson
Ritter
Walker
Ashepoo
Little Pee Dee
Pee Dee
Lake Swamp
Swamp
Little River
Black River
Santee River
Wilson River
Mingo
Lynch River
Wando
Cooper
Ashley
Bulls Bay



501
701
Loris
Bayboro
Gurley
Aynor
Cool Spring
Adrian
Longs
TO SHALLOTTE
Shell
Hammond
Little River
Hand
Little River Inlet
Jordanville
CONWAY
Nixonville
17
Burcol
Myrtle Beach
501
Peterfield
Yauhannah
701
17
Brookgreen
Wayerly Mills
GEORGETOWN
521
North Inlet
North I
South I
17
Cape Romain
OCEAN



HOWN BY LETTERS

E For Earth Graded and Drained and all types included in Bureau's Code Number 100.

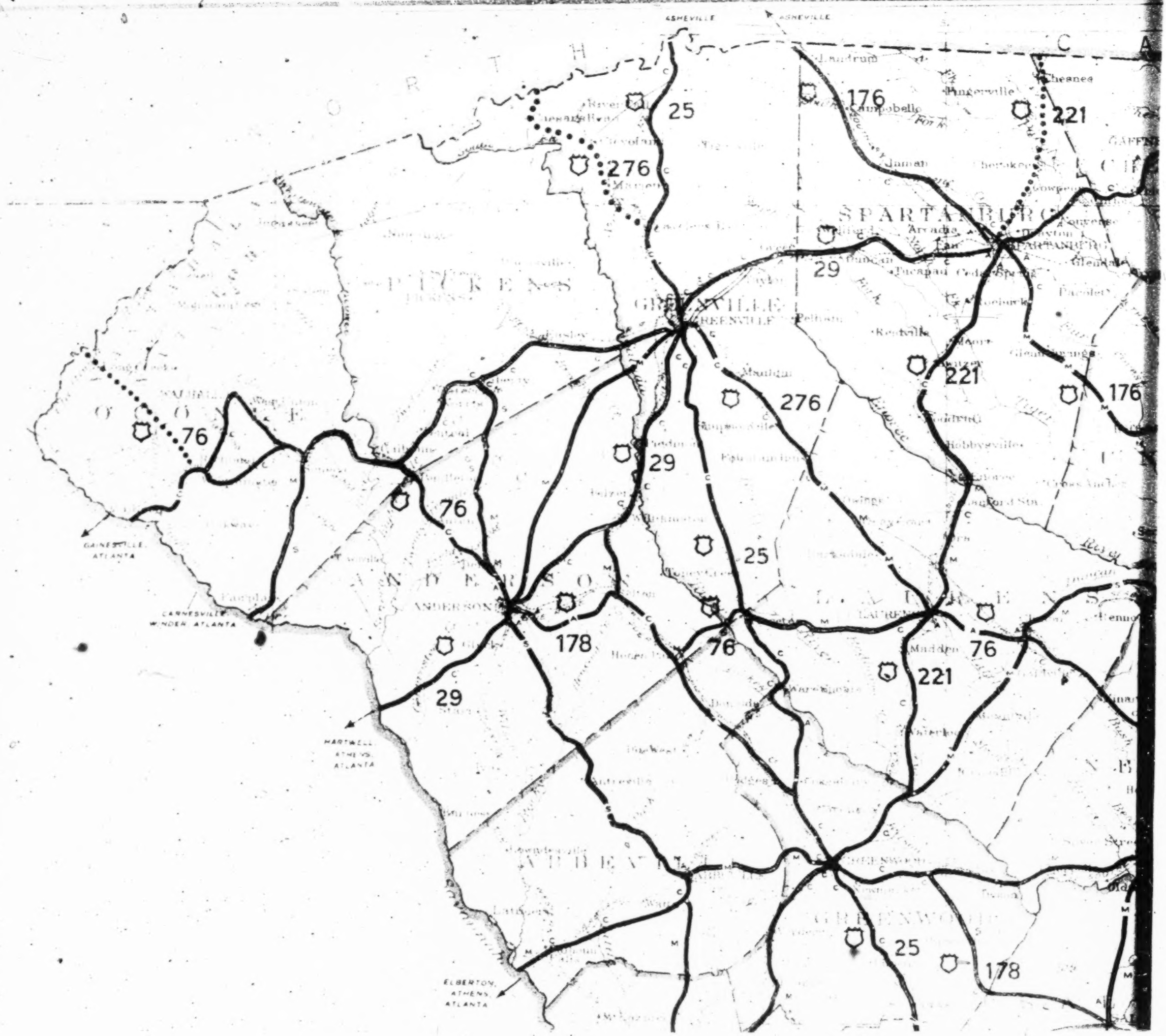
G For Gravel and all types included in Bureau's Code Numbers 202-204.

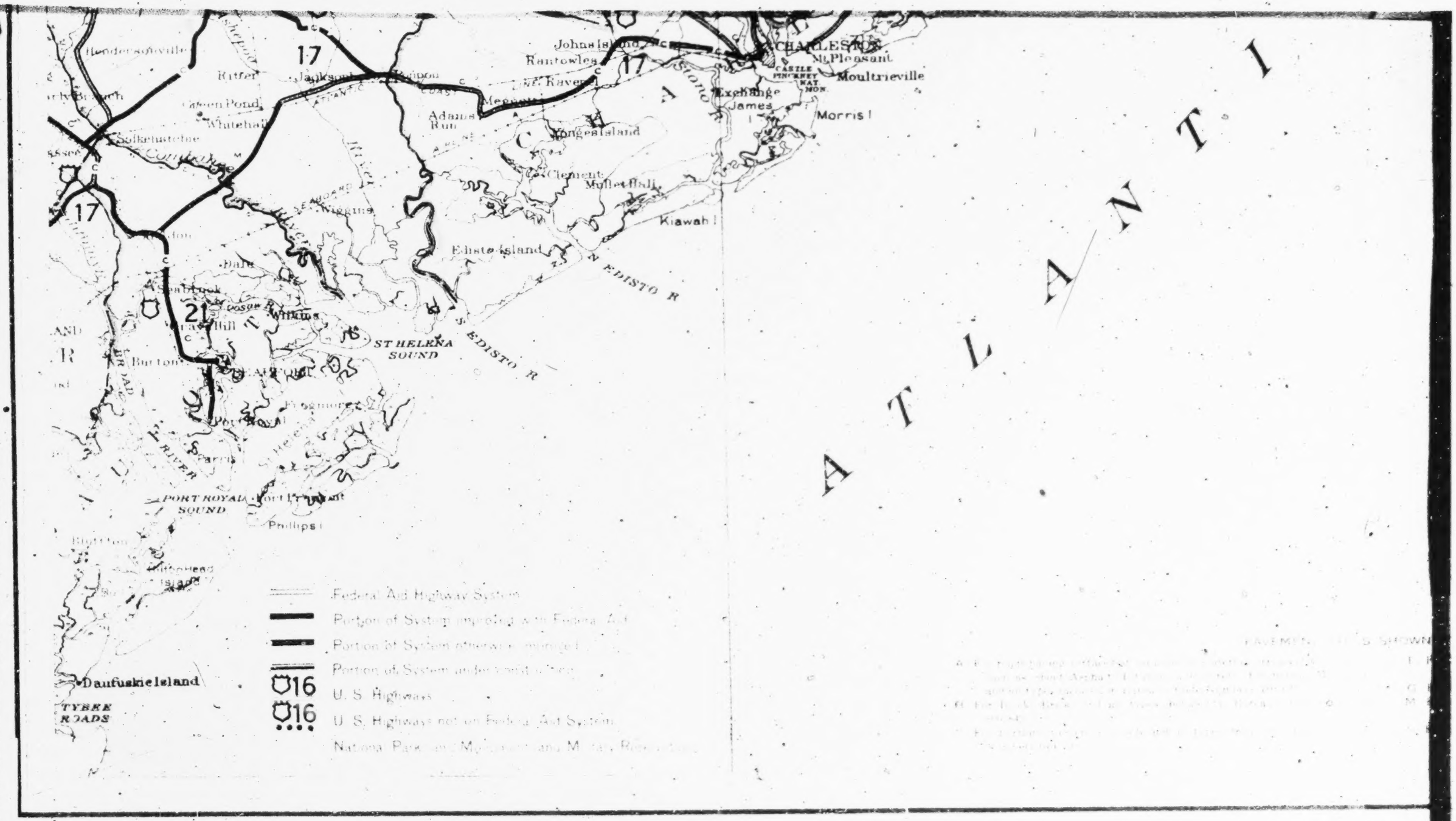
M For Surface Treated Macadam, Water-bound Macadam, and all types included in Bureau's Code Numbers 370-372.

S For Sand-Clay and all types included in Bureau's Code Numbers 304-312.

lished in accordance with Act of Congress
pproved Nov. 9, 1921, creating the Federal
d Highway System
s corrected to May 1, 1939

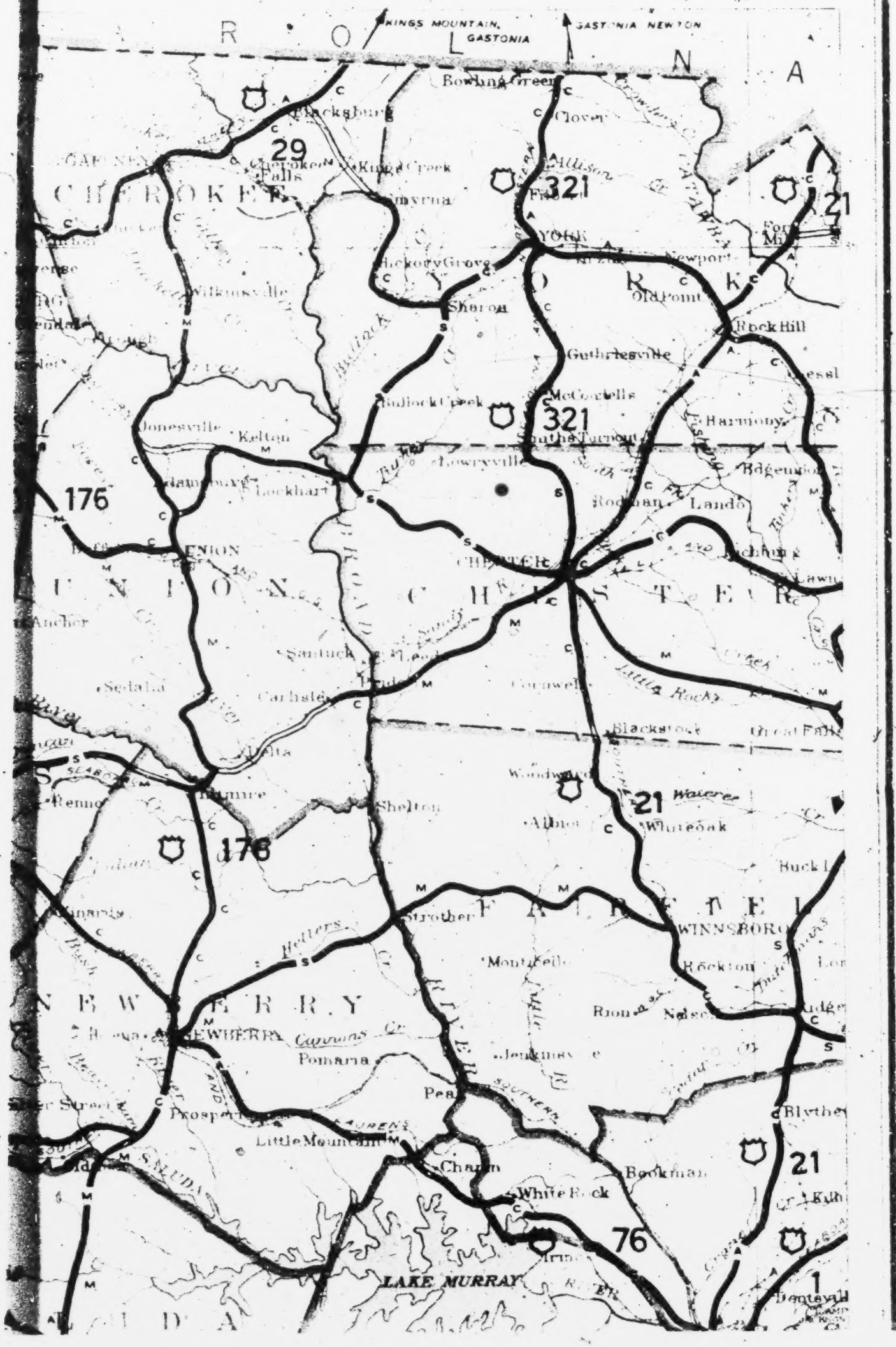
THE FEDERAL AID HIGHWAY
PROGRESS MAP

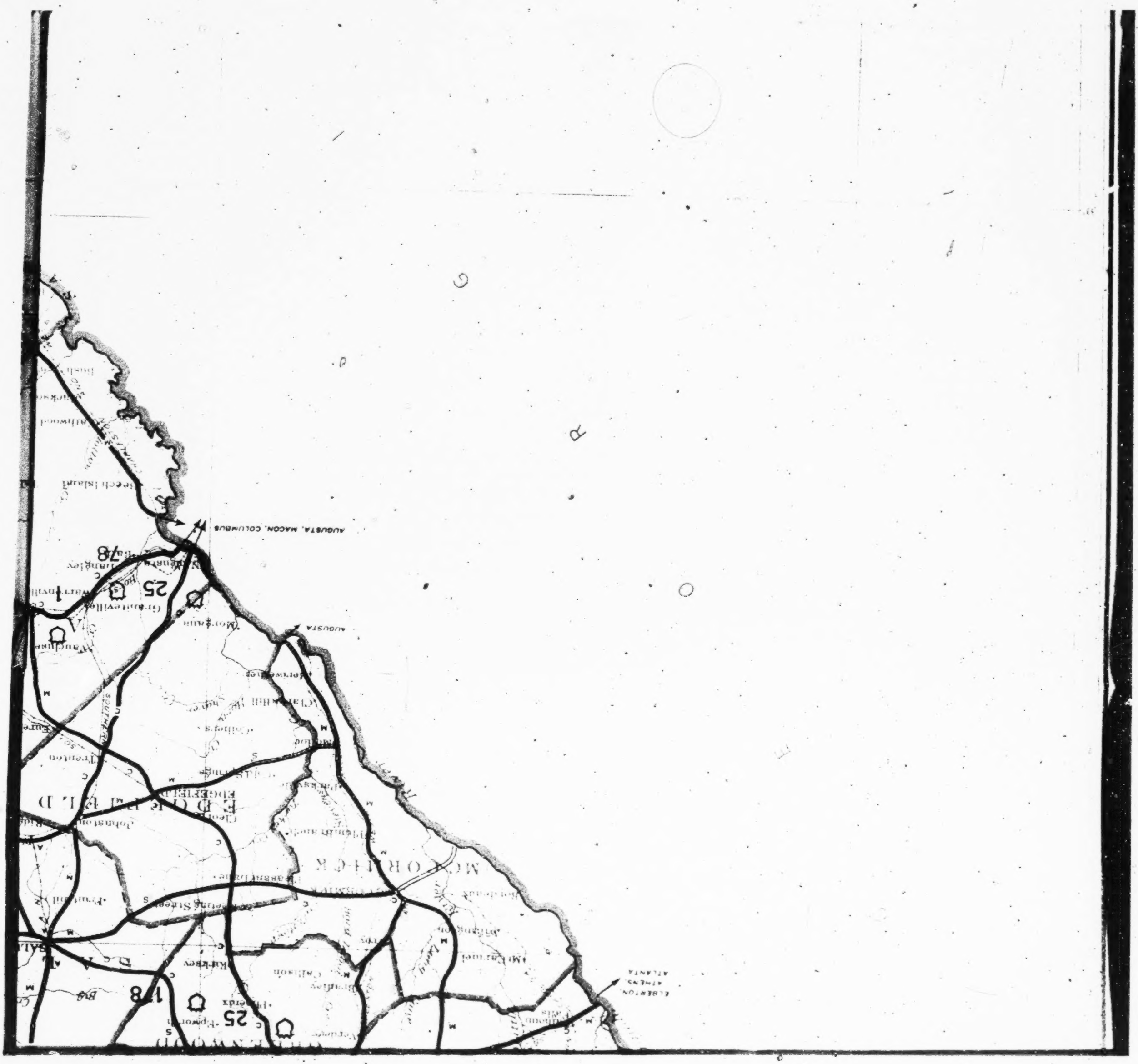


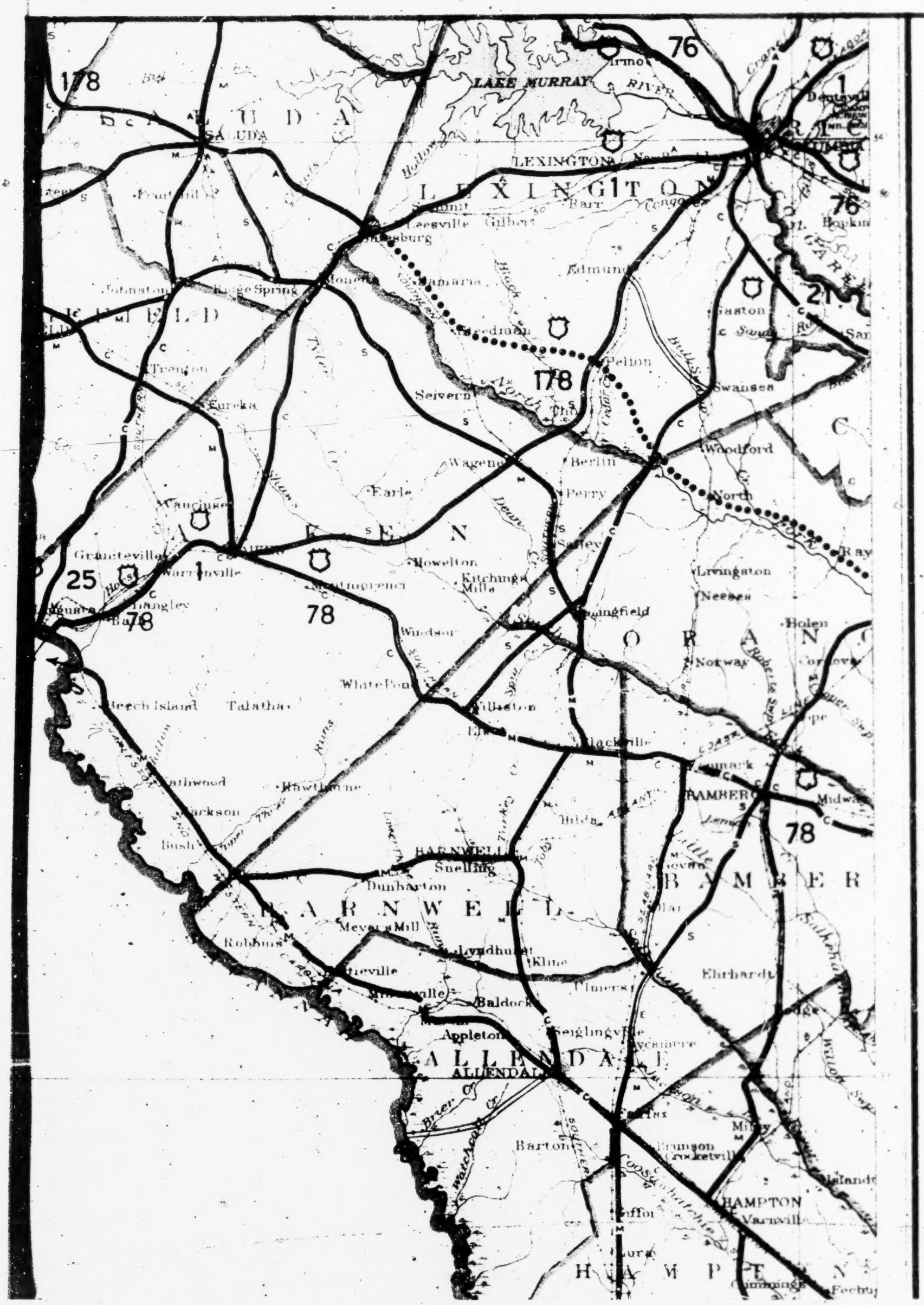


17
17
17
21
Johns Island
Rantowles
Ravenel
Meggett
Adams Run
Yonges Island
Clement
Mullet Hall
Kiawah I
Edisto Island
N EDISTO R
S EDISTO R
ST HELENA SOUND
Wiggins
Dale
Seabrook
Whitmore
Burton
Port Royal
Parris I
PORT ROYAL SOUND
Phillips I
Bluffton
Hilton Head Island
Daufuskie Island
TYBEE ROADS
Ritter
Jacksonville
Green Pond
Whitehall
Solkehatchie
Hendersonville
CHARLESTON
Mt Pleasant
Moultrieville
Exchange
James I
Morris I
CASTLE PINCKNEY NAT MON
Stono R
ATLANTI
Federal Aid Highway System
Portion of System improved with Federal Aid
Portion of System otherwise improved
Portion of System under construction
U. S. Highways
U. S. Highways not on Federal Aid System
National Park and Monument and Military Reservation

WESTERN SOUTH CAROLINA




AUGUSTA, MACON, COLUMBUS
AUGUSTA
ELBERTON, ATHENS ATLANTA
MACON
EDGEFIELD
78
25
185



LAKE MURRAY
RIVER
LEXINGTON
SALUDA
Irmo
Leesville
Gilbert
Barr
Edmund
Gaston
Swansea
Woodford
North
Livingston
Neeses
Bolen
Norway
Cordova
Pelion
Seivern
Wagener
Berlin
Perry
Earle
Howelton
Kitchings Mills
Windsor
White Pond
Williston
Blackville
Bamberg
Midway
Snelling
Dunbarton
Meyers Mill
Lyndhurst
Kline
Ehrhardt
Baldock
Appleton
Seiglingville
Barton
Brunson
Crocketville
HAMPTON
Varnville
Trenton
Eureka
Johnston
Ridge Spring
Vaucluse
Graniteville
Warrenville
Langley
Beech Island
Talatha
Hawthorne
Bush
Robbins
Cummings
Fechu
178
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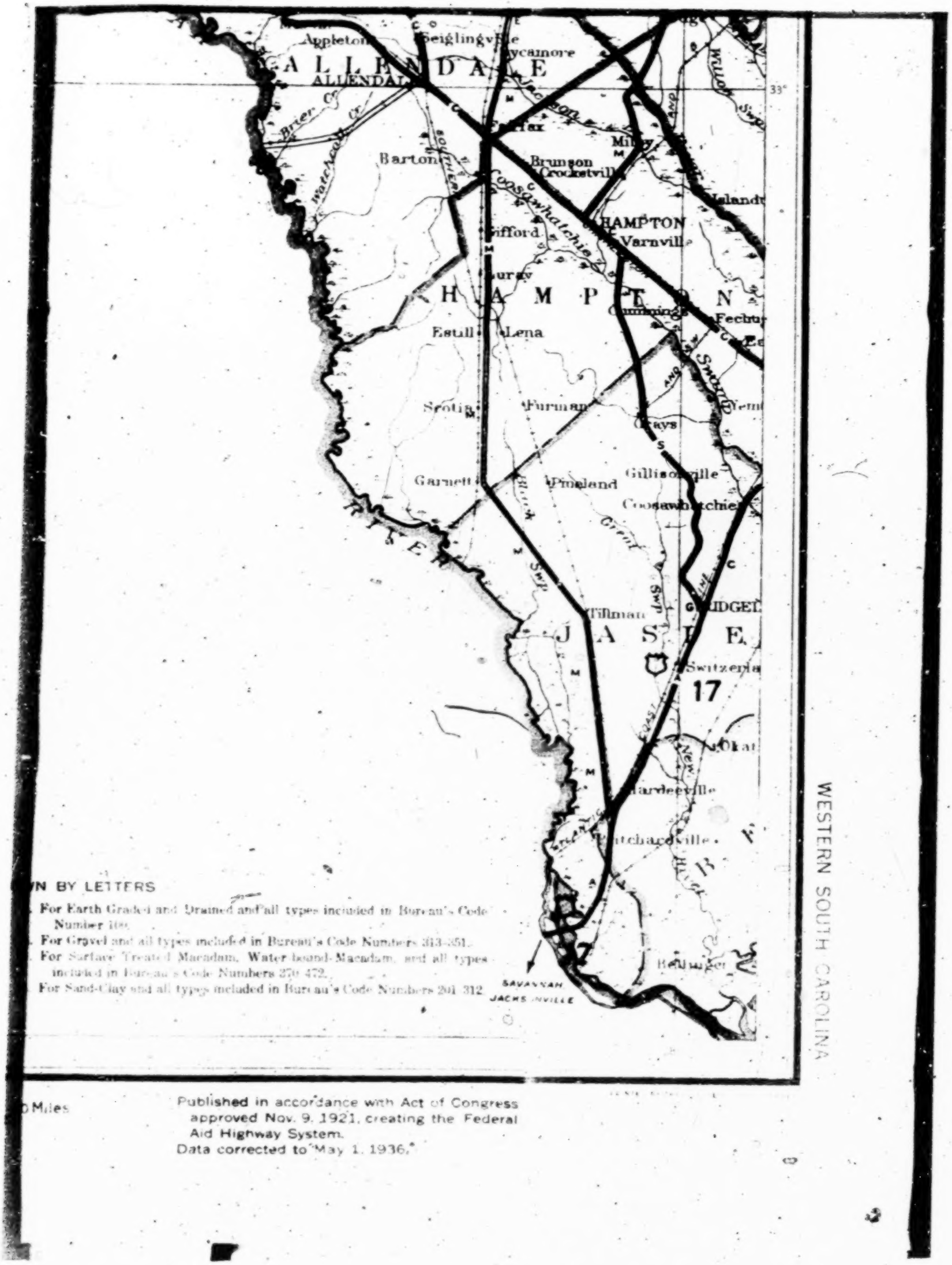

N BY LETTERS

For Earth Graded and Drained and all types included in Bureau's Code Number 100.

For Gravel and all types included in Bureau's Code Numbers 313-351.

For Surface Treated Macadam, Water bound Macadam, and all types included in Bureau's Code Numbers 270-472.

For Sand-Clay and all types included in Bureau's Code Numbers 201-312.

Miles

Published in accordance with Act of Congress approved Nov. 9, 1921, creating the Federal Aid Highway System.
Data corrected to May 1, 1936.

A

Approved Federal Aid Mileage
South Carolina 3,824.29

Federal Aid Highway System
Portion of System improved with Federal Aid
Portion of System otherwise improved
Portion of System under construction
U. S. Highways
U. S. Highways not on Federal Aid System
National Forests
National Parks and Monuments and Military Reservations

83°

PAVEMENT TYPES SHOWN BY

A. For roads having surfaces of bituminous materials irrespective of base: such as Sheet Asphalt, Bituminous Concrete, Bituminous Macadam, and all types included in Bureau's Code Numbers 480-489

B. For Brick, Block, and all types included in Bureau's Code Numbers 580-582

C. For Portland Cement Concrete and all types included in Bureau's Code Numbers 590-599

E. For E... Nu...

G. For C...

M. For S... incl...

S. For S...

Scale 1 500,000, or 1 inch = 7.891 miles
Projection Modified Polyconic
Base Map from U. S. Geological Survey State map.
Base revised as to cities and towns on F. A. H. S. and county lines by Bureau of Public Roads.
Data for pavement types on those portions of F. A. H. S. heretofore improved without F. A. compiled from latest State records.
Sections of pavement less than half a mile in length merged with adjacent section of nearest similar type.

0 10 20 30 Miles

[Endorsed:] File No. 41,642. E. South Carolina. D. C. U. S. Term No. 161. South Carolina State Highway Department, South Carolina Public Service Commission et al., appellants, vs. Barnwell Brothers, Inc., Poole Transportation, Inc., Horton Motor Lines, Inc., et al. Filed June 21, 1937. Term No. 161, O. T., 1937.

FILE COPY

Office - Supreme Court, U. S
FILED
JUN 21 1937
CHARLES ELMORE CROPLI
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL., *Appellants*,

vs.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

STATEMENT AS TO JURISDICTION.

JOHN M. DANIEL,
Attorney General of South Carolina;
J. IVEY HUMPHREY,
Assistant Attorney General of South Carolina;
M. J. HOVEN,
Assistant Attorney General of South Carolina;
EUGENE S. [illegible],
SIDNEY G. [illegible],
Attorneys for [illegible]
[illegible]

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Morris v. *Duby*, 274 U. S. 135	6, 7
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State v. *John P. Nutt Co.*, 180 S. C. 19, 297 U. S. 724	5, 7

Statutes Cited.

Act No. 259 of the Legislature of South Carolina, approved April 28, 1933 (Volume 38, Statutes of South Carolina, p. 340), Section 2	3
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Motor Carrier Act, 1935, approved August 9, 1935 (49 Statutes 543, 49 U. S. C. A. 301-327)	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT ET AL.,

Appellants,

vs.

BARNWELL BROTHERS, INC., A NORTH CAROLINA CORPORATION, ET ALS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

STATEMENT AS TO JURISDICTION.

In compliance with Rule 12 of this Court, the appellants state:

A.

Statutory Provision Sustaining Jurisdiction.

The statutory provision sustaining the jurisdiction of this Court to review the decree of the court below is Section 266 of the Judicial Code (United States Code Annotated, Title 28, Section 380), which provides that an appeal may

be taken direct to the Supreme Court of the United States from a final decree of a District Court of three judges granting a permanent injunction in a suit of this character. The final decree sought to be reviewed by this appeal is one permanently enjoining the enforcement of a statute of the State of South Carolina.

B.

The Statute of South Carolina.

The statute of South Carolina, the validity of which is involved, is Act. No. 259, approved the 28th day of April, 1933, entitled in part "An Act to Regulate and Limit the Use of the Public Highways in the State by Motor Trucks, Semi-Trailer Motor Trucks, Semi-Trailers and Trailers; * * *," and is found in Volume 38, Statutes of South Carolina, at page 340.

The pertinent provisions of the statute, the validity of which are involved, are:

1. Section 4, which provides that "No person shall operate on any highway any motor truck or semi-trailer truck whose gross weight, including load, shall exceed 20,000 pounds."; in connection with the definition in Section 2, for the purposes of the statute, reading: "'Semi-Trailer Motor Trucks' means any motor-propelled truck, not operated or driven on fixed rails or tracks, designed to draw, and to support the front end of a semi-trailer. The tractor (or motor-propelled truck), together with the semi-trailer shall be considered one unit, and the words 'Semi-trailer motor truck' as used in this Act, shall mean and embrace such entire unit. * * *"; and

2. Section 6, which provides that "No person shall operate on any highway any motor truck or semi-trailer motor truck whose total outside width, including any part of body or load, shall exceed 90 inches."

The bill itself attacked also the validity of Section 3 of the statute (prohibiting the operation of trailers, as defined in Section 2), and Section 7 (imposing a length limit of 35 feet, with an exception). But the attack on Sections 3 and 7 was abandoned during the progress of the suit, and only the gross weight limit of 20,000 pounds (Section 4) and the width limit of 90 inches (Section 6) were adjudged to be invalid.

C.

Date of Decree and Date of Application for Appeal.

The decree sought to be reviewed was entered on the 20th day of January, 1937.

The application for appeal was presented on the 23rd day of February, 1937.

D.

Nature of Case and Ruling Below.

The suit was commenced by a bill of complaint filed on the 11th day of August, 1936, wherein seven parties, engaged in the transportation of property in interstate commerce, as common or contract carriers by motor truck, and four parties, engaged in shipping produce or merchandise by motor truck in interstate commerce, joined as plaintiffs. The prayer asked only a permanent injunction. The defendants (appellants) included the South Carolina State Highway Department and the South Carolina Public Service Commission, both administrative agencies of the State, their officers and employees, various other officers of the State, and police officers charged with the duty of enforcing the Act.

The bill alleged that the weight and width limits of the Act were invalid on the grounds that:

(1) They violate the Fourteenth Amendment of the Constitution of the United States, in that they are unreason-

able, arbitrary and capricious and have no real and substantial relation to the object sought to be obtained by the Act;

(2) They are void and of no effect as to interstate commerce, in that they have been superseded by the Motor Carrier Act, 1935, approved August 9, 1935 (49 Statutes 543; United States Code Annotated, Title 49, Sections 301-327); and

(3) They violate Section 8, Article 1, of the Constitution of the United States, in that they constitute a direct and substantial burden on interstate commerce, and a direct and substantial interference with the declared objects and purposes of the Motor Carrier Act, 1935.

A motion to dismiss the bill was granted by the District Judge as to the allegations based on the Fourteenth Amendment and as to the general allegations that the provisions of the Act constituted a burden on interstate commerce, but disallowed as to the allegations that the Act constituted a regulation of interstate commerce with respect to matters covered by the Motor Carrier Act, 1935. (Opinion filed October 24, 1936; appended hereto.)

Defendants duly answered to the merits, putting in issue the material allegations of fact of the bill.

Plaintiffs moved for a temporary injunction restraining the enforcement of the Act pending a final hearing. The District Judge granted a temporary restraining order (opinion filed November 2, 1936; appended hereto), and convened a Court of three judges, pursuant to Section 266 of the Judicial Code (28 United States Code Annotated 380), before which all subsequent proceedings were had.

The defendants (appellants) filed a motion to dismiss the bill. The specially constituted District Court heard argument thereon, but decided to take evidence as to whether

the weight and width provisions of the statute constituted an unreasonable burden upon interstate commerce. All parties agreed that upon the evidence to be presented the cause would be submitted for final decree.

On the trial the Interstate Commerce Commission, together with two shippers in interstate commerce, were allowed to intervene as plaintiffs, adopting the allegations of the bill, and three interstate railroads were permitted to intervene as defendants, adopting the motions to dismiss and answer of the original defendants.

The final decree was based in part upon the conclusions of the District Court of three judges that:

1. The provisions of the Act are not violative of the due process or equal protection clauses of the Fourteenth Amendment (4th Conclusion of Law). The Court held that this question was sufficiently dealt with by the Supreme Court of South Carolina in State v. John P. Nutt Co., 180 S. C. 19; certiorari denied, 297 U. S. 724—saying that there was no occasion to add anything to what is there said, and that it agreed with the conclusion there reached on this point.

2. The Congress has not assumed to control size and weight of vehicles by the Motor Carrier Act, 1935 (3rd Conclusion of Law). The Court said that it is perfectly clear that in the Act the Congress did not attempt to exercise such power, but, on the contrary, expressly refrained from exercising it.

3. The weight and width limitations of the statute are an unreasonable burden upon interstate commerce when applied to trucks operating upon highways numbered 1, 15-A, 17, 21, 25, 29 and 52, or on such portions of other Federal Aid highways in South Carolina as may be of standard concrete or concrete and asphalt construction, except as to

bridges too weak or too narrow to carry such vehicles (1st Conclusion of Law). The court found as a fact that the standard pavement on such highways and sections of highways is "capable of sustaining without injury a wheel load of 8,000 to 9,000 pounds or an axle load of 16,000 to 18,000 pounds, depending upon whether the wheels are equipped with high pressure or low pressure pneumatic tires.", (17th Finding of Fact). But the court did not limit its injunction to trucks within these weight limits, although the court itself found them to be the maximum reasonable limits, as it did in respect of the width limit of 90 inches imposed by the statute. As to the latter, the court limited its injunction to vehicles not exceeding 96 inches in width, which was the width limit it found to be reasonable. (Section 1 of Decree; 24th Finding of Fact.)

Appellants (defendants below) contended, and now contend, that the gross weight limit of 20,000 pounds imposed by Section 4 of the Act, including the provision of Section 2 that such weight limit shall apply to tractor-semi-trailer combinations as one unit, and the width limit of 90 inches imposed by Section 6, are reasonable, bear a direct and substantial relation to the preservation of the highways and to the safety of other travelers making a normal use thereof, and that they affect interstate commerce only incidentally.

Appellants further contended, and now contend, that, by reason of facts judicially known, as well as on the evidence in the record, the contested provisions of the Act are valid police regulations in respect of the highways owned and maintained by the sovereign State of South Carolina; and that their validity is sustained by *Sproles* v. *Binford*, 286 U. S. 374, and *Morris* v. *Duby*, 274 U. S. 135.

E.

The Questions Involved Are Substantial.

A statute of Texas imposing more drastic weight limits was sustained against constitutional attack on the same grounds in *Sproles* v. *Binford,* 286 U. S. 374.

A restriction of gross weight to 16,500 pounds imposed by the Highway Commission of Oregon, pursuant to statutory authority, was sustained against constitutional attack on the same grounds in *Morris* v. *Duby,* 274 U. S. 135.

The same provisions of this statute were upheld against constitutional attack on the same grounds by the Supreme Court of South Carolina in *State* v. *John P. Nutt Co.,* 180 S. C. 19; certiorari denied, 297 U. S. 724.

No statute of a State limiting the weight and size of motor trucks which may operate upon the highways owned and maintained by a sovereign State, applicable alike to intrastate and interstate trucks, in any respect similar to the South Carolina statute, has been declared invalid by the Supreme Court of the United States.

F.

Cases Sustaining Jurisdiction.

Sproles v. *Binford,* 286 U. S. 374;
Morris v. *Duby,* 274 U. S. 135.

G.

Copies of Opinions Filed.

Appellants append hereto:

1. Copy of opinion of the District Court of three judges delivered upon the rendering of the decree sought to be reviewed, filed January 20, 1937.

2. Memorandum opinion of Honorable J. Lyles Glenn, District Judge, on motion to dismiss bill, filed October 24, 1936.

3. Memorandum opinion of Honorable J. Lyles Glenn, District Judge, on motion for temporary injunction, filed November 2, 1936.

Respectfully submitted:

JOHN M. DANIEL,
Attorney General of South Carolina;
J. IVEY HUMPHREY,
Assistant Attorney General of South Carolina;
M. J. HOUGH,
Assistant Attorney General of South Carolina;
EUGENE S. BLEASE,
STEVE C. GRIFFITH,
Attorneys for Original Defendants, Appellants.
THOMAS W. DAVIS,
DOUGLAS MCKAY,
M. G. MCDONALD,
J. B. S. LYLES,
Attorneys for Intervening Defendants, Appellants.

EXHIBIT "A".

Opinion of Three-Judge Court—Filed January 20, 1937.

On Final Hearing.

(Argued November 30, 1936. Decided ——, ——.)

Before Parker and Northcott, Circuit Judges, and Glenn, District Judge.

S. King Funkhouser, J. Ninian Beall (S. King Funkhouser, J. Ninian Beall and Frank Coleman on brief) for plaintiffs; John M. Daniel, J. Ivey Humphrey, M. J. Hough, Eugene S. Blease and Steve C. Griffith for Defendants; Thomas W. Davis and Douglas McKay for Atlantic Coast Line Railway Company, Intervenor; J. B. S. Lyles for Seaboard Air Line Railway, Intervenor; M. G. McDonald for C. & W. C. Railway Company, Intervenor; E. M. Reidy and Thomas M. Ross for Interstate Commerce Commission, Intervenor; and John E. Benton, as amicus curiæ.

PARKER, Circuit Judge:

This is a suit to enjoin the enforcement against trucks which are being operated in interstate commerce of the provisions of Sections 3, 4, 5, 6, and 7, relating to size and weight, of Act No. 259 of the General Assembly of South Carolina, approved April 28, 1933, 38 Stats. 340. The plaintiffs are either corporations engaged in operating truck lines in interstate commerce or persons or corporations engaged in shipping produce or merchandise by truck in interstate commerce. The defendants are the various officials of the State of South Carolina who are charged with the duty of enforcing the act. Intervention has been allowed on the part of one shipper, who was not a party to the original bill, and of certain railroad companies, who are interested in seeing the act enforced, on the ground that enforcement thereof will free them of competition based on violation of law. The Interstate Commerce Commission also has been allowed to intervene.

The bill as originally filed did not ask for interlocutory injunction, and a motion to dismiss was heard by the district judge and was allowed as to the allegations of the bill which merely alleged violation of the due process and equal protection clauses of the 14th Amendment and generally that the provision of the act constituted a burden on interstate commerce, but was disallowed as to allegations that the act constituted a regulation of interstate commerce with respect to matters covered by the motor carriers act of 1935. The plaintiffs thereupon asked for an interlocutory injunction forbidding the enforcement of the act pending a final hearing, and the judge granted a temporary restraining order and convened a court of three judges pursuant to Section 266 of the Judicial Code (U. S. C. A. 380). At the hearing before this court of three judges, it was decided to reconsider all the questions raised by the bill and answer and give judgment thereon in order that all matters involved in the litigation might be disposed of promptly and heard on one appeal. None of the parties objected to this course, but on the contrary expressed a desire that action be taken which would expedite the final decision of the cause. In our opinion, there could be no valid objection to this course, as the court of three judges could unquestionably permit an amendment of the bill before it, and could permit the plaintiffs to reintroduce, by such amendment, such portions of the bill as had been stricken on the motion to dismiss; and this, in effect, was what was done. It was thereupon agreed that upon the evidence to be presented the cause would be submitted for final decree by the court, and not merely in support of the application for interlocutory injunction; and the court has heard the parties fully, the evidence being directed to whether the size and weight provisions of the statute complained of constitute an unreasonable burden upon interstate commerce.

The statute in effect in South Carolina prior to the passage of the act complained of was Act No. 685, Laws of 1930 (36 Stats. 1192). It prescribed a gross weight for single vehicles of 25,000 pounds, with a maximum axle load of 10,000 pounds, and a maximum weight of any combination of vehicles of 40,000 pounds. The act of 1933 limited the

gross weight of any vehicle to 20,000 pounds and provided that any "tractor (or motor propelled truck), together with the semi-trailer" should "be considered one unit", so that a limitation of 20,000 pounds was put on the tractor-semi-trailer unit, as to which a maximum weight of 40,000 pounds had been allowed under the preceding law. Both the 1930 Act and the Act of 1933 contain provisions limiting the width of trucks to 90 inches. The bill attacks these three provisions of the Act, viz: (1) the one limiting the gross weight of single trucks to 20,000 pounds; (2) the one providing that a tractor-semi-trailer shall be considered a single unit for the purpose of determining weight and thereby limiting the weight of such combination to 20,000 pounds; and (3) the one limiting width to 90 inches. The attack is made on three grounds: (1) that the provisions of the act in question are in violation of the 14th Amendment in that "they constitute an unreasonable, arbitrary and capricious interference with the rights of plaintiffs to use the highways in a reasonable manner and for a lawful purpose"; (2) that they have been superseded by the federal Motor Carriers Act of 1935; and (3) that they constitute an unreasonable burden upon interstate commerce.

Little need be said as to the first ground of attack, i. e. that the statute is violative of the 14th Amendment. This is sufficiently dealt with by the Supreme Court of South Carolina in the case of State v. John P. Nutt Co., — S. C. —, 185 S. E. 25, Cert. denied — U. S. —; and there is no occasion to add anything to what is there said as to this aspect of the case. We agree with the conclusion there reached on this point.

And we are not impressed with the second ground of attack, i. e. that the provisions of the statute have been superseded as a result of the enactment of the Motor Carriers Act of 1935. It is not necessary to inquire into the power of Congress to regulate the size and weight of vehicles used in interstate commerce on the roads of the several states or into the limitations upon that power; for we think it perfectly clear that in the Motor Carriers Act Congress did not attempt to exercise such power, but, on the contrary, expressly refrained from exercising it. Section 225 of that Act provides (49 U. S. C. A. 325):

"The Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weight of motor vehicles and combinations of motor vehicles and of the qualifications and maximum hours of service of employees of all motor carriers and private carriers of property by motor vehicle; and in such investigation the Commission shall avail itself of the assistance of all departments or bureaus of the Government and of any organization of motor carriers having special knowledge of any such matter."

Reliance is placed upon Section 202a (49 U. S. C. A. 302a) declaring the purpose of the act, and particularly upon Section 204a (1) (2) and (3) (49 U. S. C. A. 304a) (1), (2) and (3), defining the powers of the Commission, which are as follows:

"202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this chapter.

"204. (a) Powers and duties generally. It shall be the duty of the Commission:

"(1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and re-

ports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment."

It is argued that authority in the Commission to control size and weight of motor vehicles is to be found in the provisions of Section 204, subsections a(1) and a(2), authorizing the Commission to establish reasonable requirements with respect to "safety of operation and equipment" in the case of common and contract carriers, and in the provision of subsection a(3) authorizing "standards of equipment" to be prescribed for private carriers. The presumption is hardly to be indulged that Congress intended to include size and weight in "safety of operation and equipment" or "standards of equipment", as to which the Commission was given full power of regulation, when by Section 225, size and weight were specifically dealt with and the Commission was authorized merely to investigate as to these and report on the need of regulation. The rule of statutory interpretation is well settled that "general language of a statutory provision, although broad enough to include it, will not be held to apply a matter specifically dealt with in another part of the same enactment • • •. Specific terms prevail over the general in the same or another statute which might otherwise be controlling." Ginsberg & Son v. Popkin, 285 U. S. 204, 208; Kepner v. United States, 195 U. S. 100, 125; United States v. Chase, 135 U. S. 255, 260. In the case last cited the rule is thus stated:

"It is an old and familiar rule that, 'where there is, in the same statute, a particular enactment, and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment.' Pretty v. Solly, 26 Beavan, 610, per Romilly, M. R.; State v. Com'rs of Railroad Taxation, 37 N. J. Law, 228. This rule applies wherever an act contains general provisions and also special ones upon a subject, which, standing alone, the general provisions would include. Endlich on the Interpretation of Statutes, 560."

Indeed, it would be only by a strained construction of language that the provision authorizing the commission to establish requirements with respect to safety of equipment or standards of equipment could be held to confer power to regulate size and weight of vehicles. Safety of equipment and standards of equipment as applied to vehicles moving in interstate commerce are expressions which naturally have reference to safety with respect to commerce or persons engaged therein over which Congress has undoubted jurisdiction, whereas size and weight are matters which relate chiefly to the safety and preservation of highways, as to which jurisdiction resides primarily in the several states. And it is worthy of note that the regulation of size and weight is treated by road authorities quite generally as a matter altogether different from the regulation of equipment. Thus, in the proposed Uniform Act Regulating Traffic and Highways, as redrafted in 1934 by the National Conference on Street and Highway Safety, of which the Secretary of Commerce was Chairman, in cooperation with the National Conference of Commissioners on Uniform State Laws, published by the Bureau of Public Roads of the Department of Agriculture, equipment is dealt with in an entirely separate chapter from size, weight and load. Chapter 15 of the proposed act deals with equipment and regulates such matters as lights, brakes, horns, mufflers, mirrors, wind-

shields, safety glass, inspection of equipment, etc. Chapter 16 deals with width, height and length of vehicles, use of trailers, wheel and axle loads, gross loads, etc. The Commission itself has construed the act as not imposing upon it the duty of regulating size and weight; for it has caused its Bureau of Motor Carriers to draft proposed safety regulations to be prescribed by it under the sections of the act which we have quoted, and these proposed safety regulations have no reference to size or weight of vehicles but are addressed to such matters as "lighting devices and reflectors," "safety glass," "brakes" and "Miscellaneous parts and accessories."

If there were any doubt as to the meaning of the act in this respect, and we are not to be understood as implying that we think that there is, the history of the legislation would conclusively demonstrate that it was not the intention of Congress to give to the Commission the power to regulate size and weight. The act was the legislative result of studies made by the Coordinator of Transportation under Congressional authority. In his report to the 73d Congress, 2d session (Senate Document No. 152), the Coordinator called attention in detail to state legislation regulating size and weight (pp. 206, 207), referred to the feeling that varying traffic, topographic and financial conditions in the different states warranted diversity of weight limitations (pp. 213-214), and with respect to the provision of the bill said (p. 45):

"Section 325 of the proposed bill authorizes the Commission to investigate and report to Congress upon the need for Federal regulation of the sizes and weights of all motor vehicles operating in interstate and foreign commerce, and of the qualifications and maximum hours of service of employees, this investigation to cover private as well as for-hire carriers. The Rayburn bill contains no provision respecting these matters except that it provides for regulation of the qualifications and hours of service of the employees of common and contract carriers. While the inquiry made by the coordinator's staff indicates a possible need for these forms of Federal regulation, the subject is

one which may appropriately be postponed for future consideration."

In the hearing before the Committee on Interstate Commerce of the Senate, Coodinator Eastman said (at p. 92 of hearing on S-1629, 74th Congress):

"In answer to one of your questions I started to say something about the regulations with respect to the sizes and weights of vehicles. It is true that by drastic and unreasonable regulations of that character one State might interfere with interstate commerce and prevent the reasonable operation of vehicles in interstate commerce. We do not undertake in this bill to cover that situation, except to provide for a thorough investigation of it by the Commission, with recommendations to Congress, because there is involved there not only a question of fact as to what the regulation should be but also as to how far the Federal Government has power to interfere with the exercise of the police power by the States with respect to the use of their highways."

The act as originally introduced dealt with qualifications and maximum hours of service of employees, as well as with size and weight, only in section 225. It was amended during its passage, however, so as to give the Commission authority to regulate "qualifications and maximum hours of service of employees," these words being inserted in subsections 1 and 2 of section 204a and an additional subsection as to private carriers (being subsection 3 of 204a) being added. The fact that the section prescribing the powers of the Commission were thus amended to include a part of what was already covered by Section 225, while the remainder of what was covered by that section, i. e. size and weight, were not included in the amendment, raises a strong presumption that it was not the intention of Congress that the Commission should be given regulatory power over these. The report of the Senate Committee to which the brief of the Commission refers, in saying "Such an investigation is still authorized (Sec. 225), but if the Commission determines after investigation that there is

need for such regulation, it may impose reasonable requirements without further legislation," has reference to the investigation as to need for regulation of qualifications and maximum hours of service of employees, and not to the investigation authorized as to need of regulation of size and weight of vehicles.

The Commission makes an argument based upon the rejection by the Senate of an amendment offered by Senator Duffy which provided in part "* * *. That the laws enacted in any state and regulations thereunder that relate to the maintenance, protection, safety or use of the highways therein, which do not discriminate against motor vehicles used in interstate commerce, shall not be deemed to be a burden on or an obstruction or impediment to interstate commerce, and the power to enact such laws and promulgate such regulations thereunder is hereby expressly recognized and confirmed to the respective states." The answer to this is that the effect of the incorporation of the language quoted in the statute would have been to sanction state regulations of size and weight even though these might amount to an unreasonable interference with interstate commerce and be void for that reason in the absence of Congressional approval.

To sum up on this feature of the case, we do not think that there is anything in the language or in the history of the act which shows an intention on the part of Congress to regulate the size and weight of vehicles; and it is unreasonable to think that Congress would intend, by vague general language, to clothe the Commission with power to regulate a matter of such difficulty in which detailed regulations had already been prescribed by all of the 48 states, and thereby strike down all state regulations affecting the matter and leave the subject unregulated until such time as the Commission might act. Our conclusion as to the proper interpretation of the Act is supported by the following recent decisions. L. & L. Freight Lines et al. vs. Railroad Commission of Florida (D. C. Fla.) — Fed. Supp. —, Lowe v. Stoutamire, — Fla. —, 166 Sou. 310; Railroad Com. v. Southwestern Greyhound Lines (Tex. Civ. App.),

92 S. W. (2d) 296. In the case first cited, Judge Strum well said:

"It is significant, and worthy of particular note, that the regulation of 'weights' of such motor vehicles,—obviously a most important element of regulation,—was not included amongst the matters specifically enumerated in Sec. 204 (a)(1). The Act contains no express or specific regulation, nor authority to regulate, motor carriers as to size or weights. If such authority is to be found in the Act it must be spelled out either from the general language 'to regulate common carriers by motor vehicle,' or by interpretation of the terms 'safety of operation and equipment.'

"The argument that such authority is to be found in the quoted phrases is refuted by the specific provisions of Sec. 225 of the Act (49 U. S. C. A. 325) that 'the Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weights of motor vehicles and combinations of motor vehicles * * *'. It should be noted that this section does not provide that the Commission shall determine by investigation what the sizes and weights of motor vehicles should be, and thereupon to adopt regulations to put the same into effect. The authority is merely to 'investigate and report on' the 'need' for Federal regulation of sizes and weights,—a wholly prospective matter, clearly indicating an absence of intent to presently regulate in that respect. If Congress intended to presently regulate in respect of sizes and weights, but desired the Commission to first determine by investigation what the regulations should be and thereafter put the same into effect, more apt language to that end would have, no doubt, been used. Sec. 204 of the Act specifically enumerates practically every aspect of regulation, except as to sizes and weights. The language of Sec. 225 of the Act makes it quite clear that the omission of sizes and weights was no mere oversight, but was deliberate. When that omission is viewed in connection with the language of Section 225 of the Act authorizing the Commission to investigate and 'report on' the 'need' for Federal regulation of sizes and weights,—not to determine what such regulations

shall be, nor to put any such regulation in effect, but merely to 'report,'—the conclusion is inescapable that Congress intended to withhold regulation in that respect until some future time."

We come, then, to the third ground of attack upon the statutory regulations complained of, viz., that they constitute an unreasonable burden upon interstate commerce; and we think that the contention of plaintiffs as to this must be sustained in so far as applied to the operation of trucks upon the standard concrete highways of the state and those highways which constitute the great arteries of interstate commerce, even though short stretches of them are not of standard construction, i. e. federal highways 1, 15-A, 17, 21, 25, 29 and 52. We think it an unreasonable burden upon interstate commerce to apply the 20,000 pound gross load limitation, or the statutory rule requiring that the tractor-semi-trailer combination be considered as one vehicle for the purpose of applying the gross load limitation, or the 90 inch width limitation to trucks which do not exceed 96 inches in width, using the standard concrete highways of the state. As the great arteries of interstate commerce above referred to carry the larger part of interstate traffic moving to and from the state, as well as such traffic passing through the state to and from Georgia and Florida and the states to the north, and as these arteries of interstate commerce are constructed almost entirely of standard concrete paving, we think it an unreasonable burden upon the interstate commerce moving over them to enforce the restriction above mentioned, and thereby virtually close the roads of the state to a large part of such commerce, merely because there are short sections of such highways which have not as yet been constructed of standard paving. As there are a few bridges on these highways which were not built to support the heavy trucks of modern traffic, and a few which are too narrow, we think that the enforcement of the act should not be held unreasonable as to such bridges, provided they are properly marked with warning signs forbidding trucks of excessive weight or size to enter upon them. The facts upon which these conclusions are based are as follows:

Within the past decade there has been a great development of interstate commerce by truck, and a corresponding change and development of industry in the southeastern part of the United States based upon truck transportation. The market gardening industry, the textile industry, the fertilizer industry and many others have changed in large part their method of doing business as a result of the facilities afforded them by the use of trucks in interstate commerce. This traffic has developed transportation units of great efficiency designed to carry a maximum load with a minimum of burden or strain to the roads over which they pass. Chief among these is the tractor-semi-trailer, in which the power unit is detachable from the load carrying unit, and in connection with the latter imposes no greater strain upon the highway than two trucks of corresponding weight, one following behind the other. Multiplication of axles and wheels distributes the weight of the load, and further protection is obtained from the use of low pressure pneumatic tires, so that with this modern equipment it is possible to move a heavily loaded truck over the highway with no greater injury to the modern standard pavement than would result from the movement over it of an ordinary passenger car. A large part of this interstate traffic, with all that it means to the life of the people of the southeastern part of the United States, will be virtually barred from the highways of South Carolina, and a barrier will be erected not merely against the commerce of the state but also as against the commerce of sister states, if these restrictions are enforced; and the reasonableness of the restrictions must be viewed in the light of such a consequence.

The evidence establishes that South Carolina has the best highway system to be found in the southeastern part of the United States. There are within the state 60,000 miles of roads of all kinds, of which 5,948 miles are embraced in the state highway system. Of these, 2,417 miles are of standard pavement; and the arteries of interstate commerce to which we have referred are of this character with the exception of a few short lengths, as for instance 6 or 7 miles in highway No. 1 near Cheraw, out of a total length of the highway of 140 miles or more. This standard

paving is not materially different from modern pavement used in most of the other states of the Union, is 18 or 20 feet in width, 7½ or 8 inches thick at the edges and 6 or 6½ inches thick at the center. It is capable of sustaining without injury a wheel load of 8,000 or 9,000 pounds and an axle load of from 16,000 to 18,000 pounds.

Where standard paving is involved, it is the axle or wheel load which is of importance in limitation of weight, and not the gross weight of the truck; for, no matter what the total weight of the vehicle, there is no additional stress on the road if the wheel or axle load is not excessive and there is a space of 40 inches between axles. For this reason, there is no reason for limiting gross load on such roads to 20,000 pounds and likewise no reason for considering the tractor-semi-trailer combination as one vehicle for the purpose of applying the weight limitation. Only five states of the Union limit the gross weight of vehicles to 20,000 pounds, viz., South Carolina, Tennessee, Alabama, Mississippi and Texas.

It is argued that on the roads which are paved with standard pavement there are some bridges which were constructed for a maximum ten ton load; but it appears that these bridges were constructed to bear a series of ten ton trucks going in opposite directions across the bridge (and the tractor-semi-trailer combination imposes no more stress than one truck following another); that they have been strengthened to bear the increasingly heavy traffic; and that the heavy trucks of interstate commerce have been using them at least since 1930 when the law permitted a gross weight of 40,000 pounds in a truck trailer combination. As a result of the injunction in the Nutt case these bridges, as well as the standard pavement roads, have been used by the traffic which would be excluded by the act of 1933 without substantial injury. It is true, however, that some of these bridges were not constructed to bear the heavy loads of modern traffic; and as to such bridges the load limitation of the statute cannot be held unreasonable, and our injunctive order will not protect plaintiffs in the use of such bridges where they have been properly marked

with notices forbiding their use by trucks not complying with the statutory requirements.

It is likewise argued that even where the roads are of standard construction, this construction has not been used in some of the town and city streets which are a part of the roads; and that the load limitation of the statute is a reasonable one for the protection of these streets. There is no showing, however, that there has been substantial damage to any streets as a result of the heavy traffic which has been passing over them for the past five years, and no reasonable ground to apprehend such damage in the future. And, even if this were not true, a regulation which would in effect drive a vitally important part of interstate commerce from 2,400 miles of road capable of sustaining it, because there are a few weak streets at various places in the system, is a patently unreasonable regulation. A system of highways of 2,400 miles is a substantial system. When it has been designed for the accommodation of traffic of the character carried on by the interstate motor carriers, it is unreasonable to withhold the entire system from the use of such traffic because of a few weak links, which, if injured by the traffic, can be repaired at comparatively slight expense.

So far as the width of the trucks is concerned, it appears that 96 inches is the standard width of the trucks now used in long distance hauling and engaged in interstate commerce, that 85% of the trucks manufactured for long distance hauling are of that width, and that South Carolina is the only state in the Union which limits the width of trucks using its roads to 90 inches. As this limitation would bar from the roads many of the trucks engaged in interstate commerce, and as the standard pavement roads, with the exception of about 100 miles, are 18 to 20 feet in width and furnish ample space for the safe operation of such standard width trucks, the limitation seems clearly an unreasonable one to apply to these roads.

It must be remembered in this connection that this splendid system of highways was constructed to bear the traffic developed by modern conditions; and, because it was realized that such a system would furnish highways for

interstate commerce which would facilitate the growth and development of the nation, the federal government has supplied to the state of South Carolina funds for their construction amounting to $29,000,000, which has been used for that purpose. While the fact that the federal government has aided in the construction of the highways does not, of course, detract from the power of the state to regulate and control them (Morris v. Duby, 274 U. S. 135, 143) it is, we think, a circumstance which should be considered in passing upon the reasonableness of a state statute the effect of which would be to drive an important part of interstate commerce from the highways and withdraw them to that extent from the use for which they were intended and for which the federal aid was granted. The purpose of this aid in the development of interstate commerce was referred to by the Supreme Court in Nashville etc. R. Co. v. Walters, 294 U. S. 405, 417. In that case the court said of the highways of Tennessee, what is true of these federal aid highways of South Carolina:

"The State highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal-aid highways legislation. The aim of that legislation is 'a connected system of roads for the whole nation'; 'to provide complete and economical highway transport throughout the Nation'; to furnish 'a new means of transportation, no less important to the country as a whole than that offered by the railroads'; to establish 'lines of motor traffic in interstate commerce.' The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails. The relief of the unemployment incident to the business depression has been the main incentive for highway construction since April 4, 1930—the period in which the highway here in question was undertaken and completed.

"To achieve its purposes, the Federal Government has made large contributions to the cost of the Federal-aid highway system. In each year, it has made to each State grants in money, proportioned according to various factors, to be expended in defraying up to one-half the cost

of constructing therein the designated highways. In addition, it has, through the War Department, allotted to the several States their pro rata shares of surplus war equipment and supplies valued at more than $224,000,000. It has at all times given to the several States the benefit of its economic and physical research; and other aid by its experts and administrators. It has, since the depression, given to the several States emergency grants to be expended in highway construction for the relief of unemployment. In the fiscal years ending June 30, 1931, 1932 and 1933, during which this highway was authorized and completed, Tennessee received from the Federal Government, for the highway system, in cash, $11,063,325; and at the close of that period practically the entire expense of building Federal-aid roads in the State was being borne by the Federal Government.

"The Secretary of Agriculture, acting through the Federal Bureau of Public Roads, has determined in large measure, not only the location of the Federal-aid highways in the several States, but also their character and their incidents. Early legislation provided that: 'The Secretary of Agriculture and the State highway department of each State shall agree upon the roads to be constructed therein and the character and method of construction.' The Act of 1921 required each State to select and submit to the Secretary, for approval as the object of future Federal-aid expenditures, 'a system of highways not to exceed 7 per centum of the total mileage of such state'; the system was to 'be divided into two classes, one of which shall be known as primary or interstate highways, and the other which shall connect or correlate therewith and be known as secondary or intercounty highways.' Congress transferred to the Secretary the powers and duties in relation to highways and highway transport originally conferred upon the Council of National Defense. The War Plans Division of the General Staff and Corps of Engineers of the War Department promptly cooperated with the Bureau of Public Roads 'in a study the purpose of which is the selection of those highways which are important from a military standpoint.'

"Upon the secretary devolves the duty of prescribing needful rules and regulations, including such recommendations as he might deem necessary for insuring the safety of traffic on the highways.'"

And as bearing upon the reasonableness of regulations which would thus burden and hamper interstate commerce by truck, and in effect drive much of it from the roads of the state, we must consider the experience of other states and the judgment of those having special knowledge with respect to dealing with size and weight of vehicles using the highways. In this connection we find that the proposed Uniform Act Regulating Traffic on Highways to which we have heretofore referred, published by the Bureau of Roads of the United States Department of Agriculture in 1934, and drafted by the National Conference on Street and Highway Safety in the Department of Commerce, provides a width of 8 feet for motor vehicles, a wheel load of 8,000 and an axle load of 16,000 pounds with high pressure pneumatic tires and a wheel load of 9,000 and an axle load of 18,000 pounds with low pressure tires. The following organizations cooperated in the conference in which this proposed uniform act was drafted, viz.: Bureau of Public Roads, U. S. Department of Agriculture; American Association of Motor Vehicle Administrators; American Automobile Association; American Mutual Alliance; American Railway Association; American Transit Association; Chamber of Commerce of the United States; National Automobile Chamber of Commerce; National Bureau of Casualty and Surety Underwriters; and National Safety Council. Practically the same recommendations with respect to size and weight, and identically the same as to the matters here under consideration, were made by the American Association of State Highway Officials in convention at Washington Nov. 17, 1932; and these have been approved by the following groups: American Automobile Association; American Farm Bureau Federation; American Motorists Association; American Petroleum Institute; Automobile Manufacturers Association; Detroit Board of Commerce; National Association of Motor Bus

Operators; National Grange; National Highway Users Conference; National Industrial Traffic League; National Transportation Committee; and Rubber Manufacturers Association.

The American Association of State Highway Officials in its publication "Who shall use the highways and how", in addition to making the foregoing recommendation as to size and axle weights, says: "Highway stresses are ruled by *wheel loads* and not by *gross loads*", and "so far as road surfaces are concerned, the limitation of axle or wheel loads gives full protection, let gross loads be what they may". For protection of bridges it recommends that gross weight be fixed by the formula W * C (L plus 40), where W represents total gross weight, L the distance in feet between the first and last axles of a vehicle or combination of vehicles, and C a co-efficient to be determined by the individual states. For this co-efficient a minimum of 700 is recommended. Under this recommendation the minimum gross weight limit could hardly be less than 35,000 pounds.

The law applicable to the situation, is we think, reasonably clear. There can be no doubt as to the power of the state to prescribe reasonable regulations limiting the size and weight of vehicles upon its highways, both for the sake of preserving the highways themselves and for the protection of the public using them. There is a broad range of legislative discretion with respect to such matters, and legislation is not to be condemned merely because the courts may not agree as to its wisdom. Sproles v. Binford, 286 U. S. 374, 388; Morris v. Duby, 274 U. S. 135. But as indicated by the court in the case last cited (274 U. S. at 145), such regulation must not be so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution toward the building of the highways. In other words, the states in the exercise of their inherent police power may regulate the use of the highways for the protection of the highways themselves and the safety of the public using them, and certainly in the absence of legislation by Congress may make such regulation applicable to interstate as well as intrastate traffic; but they may not adopt

arbitrary regulations, not reasonably necessary for the protection of the highways or of the public, which will directly burden interstate commerce, even though such regulations may not discriminate as between commerce which is interstate and that which is not. As was well said by Mr. Justice Strong in Railroad Co. v. Huson, 95 U. S. 465, 473-474: "The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and under color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

Under our dual governmental system the control of the highways is committed to the states, whereas the control of interstate commerce passing over those highways is committed to the federal government; and since the decision in Gibbons v. Ogden, 9 Wheat. 1, it has been settled that the states may not in their control of the highways burden or interfere with the free flow of interstate commerce, the regulation of which has been intrusted to Congress. This would not be doubted if the highway in question were a navigable river, but the principle is the same whatever the character of the highway over which the interstate commerce moves. Thus, the federal power extends over artificial waterways constructed by the states (Ex Parte Boyer, 109 U. S. 629, 632), and over a railroad handling cars moving in interstate commerce, although the railroad has been constructed and is being operated by one of the states (U. S. v. State of California, 297 U. S. 175, 56 S. Ct. 421). And when a state builds a road as a highway of commerce, it cannot burden the flow over it of commerce interstate in character. Buck v. Kuykendall, 267 U. S. 307. As said by Mr. Justice Brewer in In re Dobs, 158 U. S. 564, 590:

"Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that

in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

"Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

We have given careful consideration to what was said in Morris v. Duby and Sproles v. Binford, supra, and were at first inclined to think that these decisions were conclusive of the case before us. Upon more mature consideration, we do not think this is correct. It is true that in Morris v. Duby a state statute prescribing a maximum load weight of 16,500 pounds was upheld, and in Sproles v. Binford one prescribing a net load of 7,000 pounds; but in neither of these cases was there any such showing of the unreasonableness of the limitation and of the direct burden upon interstate commerce when applied to a system of standard concrete roads as is contained in the record before us. The same is true of State v. Nutt, supra. In Sproles v. Binford the court commented on the fact (p. 385) that the roads capable of carrying a greater load than the maximum permitted by the statute did not form a regularly connected system and were scattered throughout the state and that the operations of complainant were conducted over all types

of highways and bridges. Here we have a connected system of standard highways of the finest character; and there is no reasonable relation between the limitations complained of and the preservation or safety of such highways. In the light of experience and of scientific knowledge, there is no ground for reasonable difference of opinion as to the gross load limitation of 20,000 pounds not being necessary for the protection of such roads themselves, and there is even less justification for the requirement that the tractor-semi-trailer combination be counted one unit for the purpose of computing gross load. So far as safety is concerned, the evidence shows clearly that there is less danger to traffic from the standard trucks of interstate commerce than from smaller trucks carrying a load for which they are not designed; and certainly there is not enough advantage in a 90 over a 96 inch width to justify the exclusion from an 18 or 20 foot highway of trucks of a width permitted by all other states of the Union. It is true that the enforcement of the provisions of the statute would probably reduce traffic on the highways to the extent that it would greatly reduce the amount of long distance hauling by truck, but it would do this by placing a direct burden on the interstate commerce now using such highways; and as the highways were constructed to carry such commerce and there is no evidence that the traffic has become so dense as to be a menace to the safety of persons using them, there is no justification for burdening interstate commerce to achieve such a result.

There is another angle from which the reasonableness of police regulations burdening interstate commerce in this way must be judged. Not only has Congress aided in the construction of the roads so that they may become highways of such commerce, but in the enactment of the motor carriers' act, it has recognized truck traffic as a legitimate part of that commerce essential to the welfare of the public and subject to regulation for that reason. As said of Federal aid legislation in Bush Co. v. Maloy, 267 U. S. 317, 324, this legislation regulating motor carriers is of significance because it makes clear the purpose of Congress that state highways shall be open to commerce of that character. Congress has not attempted to regulate size and weight and

there are great practical difficulties in the way of such regulation by Congress. It is of great importance, therefore, that regulation of this matter by the states be held within reasonable bounds, and that they be not permitted, under guise of exercising the police power, to exclude from their highways by unreasonable regulations the interstate commerce which Congress is regulating in the public interest and for the carrying of which it has aided in the construction of roads that form parts of a great national system of highways.

As to highways of the state, other than those which have been paved with standard concrete or standard concrete and asphalt paving, we cannot say that the provisions of the act are unreasonable; and there is no basis upon which an injunction should issue enjoining the enforcement of the act so far as they are concerned. As to them the principles laid down in Morris v. Duby and Sproles v. Binford are applicable. The same is true of bridges which have not been constructed for carrying the heavy trucks of modern traffic, even though they may be located on standard highways. If there were a great many of these, their presence would justify the application of the act to the entire system of highways, but the evidence shows that they are comparatively few in number; and interstate commerce, or at least a large part of it, could be so routed as to avoid them entirely. We think, however, that where it is the intention of the defendant to enforce the provisions of the act with respect to any bridge on the roads constituting the arteries of interstate commerce to which we have referred, or on other roads paved with standard concrete paving, notices to that effect should be posted on both sides of the bridge, of sufficient size and character to give ample warning that the use of the bridge is forbidden to trucks with a gross weight in excess of ten tons or of a width exceeding 90 inches. As the bridges in question are probably capable of carrying the traffic as they have been carrying it for the past five years, we feel justified in enjoining the enforcement of the act as to them unless notice is posted as herein indicated. And in order that the use of bridges may not be unreasonably denied to plaintiffs, and that no hardship may result

from the enforcement of our injunctive order with respect to contingencies which may arise and which we are not able now to foresee, we will retain jurisdiction of the cause to the end that the injunctive order may be modified as occasion for such modification may arise.

We are not to be understood as holding that the federal courts possess any regulatory power over the states in the control of the roads. So long as that control is exercised so as not to interfere unreasonably with interstate commerce, the courts have no power to interfere. Any regulation limiting size and weight, having reasonable relation to the preservation of the highways or the safety of persons using them, must be upheld; and we do not doubt the power of the states, in the reasonable exercise of the police power, to bar certain types of vehicles entirely from their roads, or entirely to forbid the use of trucks on certain of the roads provided other roads are available for the use of traffic of this character. But we do not think that the state may erect a Chinese wall around itself by adopting regulations the effect of which would be to bar a large part of interstate traffic from all of its highways when such regulations have no reasonable relation to their safety or preservation. A gross load limit of 20,000 pounds, as we have seen, has no reasonable relation to either safety or preservation of the standard highway, the provision for counting the tractor-semi-trailer combination as one unit for applying the gross load limitation has even less to commend it, and the 90 inch width limitation, while doubtless reasonable when viewed *in vacuo,* cannot be defended in view of the fact that all other states permit the standard width of 96 inches and the only practical effect of the 90 inch limitation is to close the roads to a large part of interstate traffic. It must not be forgotten that the roads, in the final analysis, belong to the people. They are held by the states in trust for the people, who are entitled to make a reasonable use of them. Use for the purposes of interstate transportation is a reasonable use, the control of which the people have vested in the federal government; the states may not unreasonably interfere with such use; and an interference, not necessary to the safety or protection of the roads, which burdens inter-

state commerce and excludes a large part of it from using the roads, must be condemned as unreasonable. The highways of interstate commerce must not be unreasonably obstructed by the states, whether they be natural highways such as rivers, or whether they be artificial highways which the people themselves have constructed and dedicated to the purposes of commerce.

We have considered the argument that the agricultural interests of the state are served by the trucks which come to the fields for the delivery of fertilizer and the collection of vegetables for market, and we realize that this involves the use of roads other than the standard concrete highways; but we cannot say that the statute is unreasonable as applied to such roads. The argument that the number of heavy trucks using such roads is few and the damage to them from such occasional use is inconsequential, is a matter for the consideration of the state legislature. Only with respect to the highways specifically mentioned and those federal aid highways of standard concrete or standard concrete and asphalt construction can we pronounce the provisions of the act unreasonable; and only as to them will its enforcement be enjoined as an unreasonable burden on interstate commerce.

Decree Accordingly.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL.,

Appellants,

vs.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF FOR INTERVENING DEFENDANTS, APPELLANTS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL.,

Appellants,

vs.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF FOR INTERVENING DEFENDANTS, APPELLANTS.

Opinion of the Lower Court.

The opinion of the specially constituted District Court of the United States for the Eastern District of South Carolina, filed January 20, 1937, is reported in 17 Fed. Supp., p. 803, and is found on page 55 of the record.

Jurisdictional Statement.

The statement as to jurisdiction required by Rule 12 of this Court, was filed on June 1, 1937, and probable jurisdiction was noted on October 11, 1937.

Statement of Case.*

This case is an appeal from the final decree of the specially constituted District Court of the United States for the Eastern District of South Carolina entered by that court on January 20, 1937 (R. 85). The decree permanently enjoins the enforcement of certain sections of a statute of South Carolina which limit the weight and width of motor trucks which may be used on its highways in interstate commerce. The injunction is limited to the plaintiffs below, while they are engaged in interstate commerce on certain designated highways only and such other Federal aid highways as may be of standard concrete, or asphalt and concrete construction (R. 85).

Statute Involved.

The statute of South Carolina the validity of which is involved herein is Act No. 259, approved April 28, 1933, entitled in part, "An Act to Regulate and Limit the Use of the Public Highways in the State by Motor Trucks, Semi-Trailer Motor Trucks, Semi-Trailers and Trailers; * * *" and is found in Vol. 38, St. at Large, p. 340 (Appendix I).

The pertinent provisions of the statute are:

Sec. 1 declares the public policy of the State as to the effect of heavy motor trucks on the construction, maintenance and safety of use of the highways.

NOTE.—For the convenience of the Court, counsel for the original and intervening defendants, appellants, have incorporated in their separate briefs identical statements of the case, legislative and judicial history, and summary of the evidence.

Sec. 4 provides that "No person shall operate on any highway any motor truck or semi-trailer truck whose gross weight, including load, shall exceed 20,000 pounds;" which should be read in connection with the definition in Sec. 2 reading: " 'Semi-Trailer Motor Trucks' means any motor-propelled truck not operated or driven on fixed rails or tracks, designed to draw, and to support the front end of a semi-trailer. The tractor (or motor-propelled truck), together with the semi-trailer shall be considered one unit, and the words, 'Semi-trailer motor truck' as used in this Act, shall mean and embrace such entire unit * * *'."

Sec. 6 provides that "No person shall operate on any highway any motor truck or semi-trailer motor truck whose total outside width, including any part of body or load, shall exceed 90 inches".

Sec. 7 of the contested Act, relating to the permissible lengths of vehicles was slightly amended by Act No. 746, approved March 10, 1934 (38 St. at Large 1311), adding certain kinds of transportation to the exemptions of the Section, but such amendment is not material in this case.

While the bill of complaint (R. 2, 19) attacked the validity of Sec. 3 of the statute, which prohibits the operation of trailers, and Sec. 7, which imposes a length limit of 35 feet, the attack on these two Sections was abandoned during the suit, that is to say there was no evidence introduced by appellees to sustain their attack on these two sections and only Sec. 4, imposing a gross weight limit of 20,000 pounds, and the provision of Sec. 2, requiring a tractor semi-trailer combination to be considered as a single unit for determining weight, and Sec. 6, imposing width limit of 90 inches, were adjudged to be invalid.

Legislative History of Statute.

The Legislature of South Carolina first dealt with the weight and width limit of motor vehicles in 1920. Act No.

602, approved March 10, 1920 (31 Stats. at Large 1072), Appendix III, created the State Highway Department and Sec. 13 thereof, which dealt primarily with the licensing of motor vehicles, based on the manufacturer's weight, contemplated the licensing of trucks "up to and including seven and over (tons)" but "Provided, that no truck larger than a four-ton truck shall be allowed to be used on any highway or public road of this State, unless the person desiring to operate any such truck larger than a four-ton truck shall first make a petition to the authorities in charge of the roads in any county where it is proposed to operate such truck, stating the road or roads proposed to be used" and unless the road authorities consent to the use of such truck on such roads with the approval of the State Highway Engineer.

Act No. 721, approved March 26, 1924 (33 Stats. at Large 1182), Appendix IV, regulated traffic upon the highways of the State. Sec. 1 thereof made it unlawful to operate on any public road of the State, whether such roads are in the State system or not, "any vehicle of four wheels or less, the gross weight of which, including its load, is more than 20,000 pounds, or to operate any vehicle having a greater weight than 15,000 pounds on any one axle, or having a load of over 600 pounds per inch width of wheel concentrated upon the road surface".

Act No. 685, approved March 20, 1930 (36 Stats. at Large 1192), Appendix V, again changed the weight limits of motor vehicles and Sec. 3 thereof provided: "Except as authorized in Sec. 4 hereof, no vehicle, whether operated singly or in combination with other vehicles on the public roads of this State, shall exceed in gross weight twelve and one-half (12½) tons, and the gross weight on no axle of any vehicle or combination of vehicles, having more than two axles, shall exceed five (5) tons. Any vehicle having more than two axles shall be so designed and constructed as to

assure a constant distribution of weight among the axles while such vehicles are in operation, regardless of irregularities in the road surface. No combination of vehicles operated as a unit on the public roads of the State shall have a gross weight exceeding twenty (20) tons: * * *".

In 1931, there was enacted Act No. 575, approved June 27, 1931 (37 Stats. at Large 1086, Appendix II), which created a commission to investigate motor transportation in the State of South Carolina and required the report of the commission to be made to the 1932 Session of the General Assembly, and to include "full findings of fact, together with recommendations and suggested legislation, preferably in the form of Bills." This commission held exhaustive hearings, with full opportunity to interested parties to present their views. During such hearing, Dr. C. H. Moorefield, then Chief Engineer of the State Highway Department, and distinguished as a highway engineer and builder, appeared and testified. His statement was introduced in evidence in this case and incorporated a statement previously prepared by him as testimony on a similar investigation held by the State Railroad Commission (Exhibits 8, 9 and 10, R. 255-271).

The foregoing recital of legislative history of the statute indicates most clearly the previous experiments the Legislature had made in trying to arrive at a proper weight limit and the deliberate consideration given to the subject for two years preceding the enactment in 1933 of the limitations herein assailed.

The present width limit of 90 inches was imposed by Act No. 602, approved March 10, 1920 (31 Stats. at Large 1072), and has since been continued unchanged.

Judicial History of the Statute.

Before this suit was begun, the same provisions of the statute now assailed were upheld by the South Carolina

Supreme Court in a suit in which the same constitutional objections (including the attack under the Commerce Clause, but not including that based on the Federal Motor Carrier Act, 1935) were raised in the case of *State* v. *John P. Nutt Co.*, 180 S. C. 19; certiorari denied by this Court March 30, 1936, 297 U. S. 724. The opinion in that case, relying on numerous decisions of this Court, fully sustained the statute and also contains a detailed history of successful resistance to the enforcement of the Act by interests opposed to it, indicating a long continued thwarting of the legislative will by injunctive process. Notwithstanding the fact that the motor carriers who are parties plaintiff herein were not parties to any of the actions in the lower State courts mentioned in the opinion in the *John P. Nutt* case, it seems a clear inference from the allegations of the bill in this case that these parties successfully defied the enforcement of the South Carolina Act during this period and even continued to operate in violation thereof after the final determination of the validity of the statute by refusal of this Court to grant certiorari and until the granting of the temporary restraining order herein in November, 1936 (R. 37).

It may be further noted, in connection with the Judicial History of this Statute, that the District Judge herein, who had first heard the motion to dismiss in this case before the application for an interlocutory injunction and the convening of the Three Judge District Court, reached the same conclusion in upholding the statute, both under the Fourteenth Amendment and the Commerce Clause, as did the State Supreme Court (R. 24, 25).

Summary of Complaint.

The suit was commenced by a complaint filed on the 11th day of August, 1936, wherein seven parties, engaged in the transportation of property in interstate commerce, as common or contract carriers by motor truck, and four parties,

engaged in shipping produce or merchandise by motor truck in interstate commerce, joined as plaintiffs (R. 2-3). The prayer asked only a permanent injunction (R. 19).

The defendants (appellants) included the South Carolina State Highway Department and the South Carolina Public Service Commission, both administrative agencies of the State, their officers and employees, various other officers of the State, and police officers, all charged with the duty of enforcing the Act (R. 3-4).

Certain shippers and the Interstate Commerce Commission were permitted to intervene as parties plaintiff (R. 42, 50-54) and certain railroads were permitted to intervene as parties defendants (R. 43, 49, 54). The Interstate Commerce Commission asked to intervene only because of its interest in the enforcement of the Motor Carrier Act, 1935 (R. 43).

The complaint alleged that the weight and width limits of the Act were invalid on the grounds that:

(1) They violate the Fourteenth Amendment of the Constitution of the United States, in that they are unreasonable, arbitrary and capricious and have no real and substantial relation to the object sought to be obtained by the Act (paragraph 6 of complaint, R. 7).

(2) They violate Section 8, Article 1, of the Constitution of the United States, in that they constitute a direct and substantial burden on interstate commerce (paragraph 7 of complaint, R. 8).

(3) They are so arbitrary and unreasonable that they defeat the useful purposes for which Federal Aid (Secs. 1 to 56, Title 23, U. S. C.) has been granted, i. e., the bettering of the highway system of the United States and the promotion of the national defense (paragraph 8 of complaint, R. 8).

(4) The Motor Carrier Act, 1935 (Sec. 301 to 327, Title 49, U. S. C.), (a) has entirely superseded the South Carolina statute, and (b) renders the South Carolina statute a direct and substantial burden on and interference with interstate commerce, in violation of the Commerce Clause of the Federal Constitution, in that the enforcement of such statute subverts and defeats the declared purposes of said Motor Carrier Act (paragraph 9 of complaint, R. 8-11).

As a factual basis for the relief asked, the complaint further alleged (R. 8) that the essential service of interstate commerce cannot be performed by the several motor carriers with the use of motor equipment limited to a maximum weight of 20,000 pounds and the effect of such limitations in South Carolina would prevent interstate motor carriers from rendering adequate and efficient transportation service and (R. 15) will substantially increase the cost and time of transportation by plaintiffs and substantially increase the cost of transportation to the public and affect the price of goods moving in interstate commerce. There were further allegations that if the limitations of the statute were enforced, plaintiffs will be irreparably damaged and their business impaired or ruined (R. 12, 16, 17).

Rulings Below and Final Decree.

Before the convening of the Statutory Three Judge Court, the District Judge had granted Appellants' motion to dismiss complaint as to Paragraphs 4, 5, 6, 7 and 8 thereof, Paragraph 7 having alleged that the statute violated the Commerce Clause, but refused the motion as to Paragraph 9 of the complaint which related to the Motor Carrier Act, 1935 (Opinion and Orders, R. 22-32).

Appellants filed their answer putting in issue the material allegations of the complaint (R. 38) and appellees (plaintiffs) thereupon moved for interlocutory injunction pending final hearing (R. 32, 33). This was presented to a

single Judge who, after hearing, ordered temporary restraining order to issue to remain in effect until the application for interlocutory injunction could be decided by a three-judge court (R. 34-38). The District Judge convened the Three Judge Court pursuant to statute, before which all subsequent proceedings were had (R. 42). Appellants again moved to dismiss the complaint (R. 44) which motion, after argument, was overruled (R. 97).

The Court ruled that it would reconsider all of the questions heretofore determined by the District Judge and render decision on the complaint as filed (R. 97) and further ruled as to the scope of the hearing (R. 98): "In other words, we will pass upon the question as to whether the Act constitutes an unreasonable burden upon interstate commerce, and we are of the opinion that testimony should be addressed to that question and that question alone, and we see no reason why any great volume of testimony need be taken, or we see no reason why the taking of testimony should consume very much time."

It was thereupon agreed in open court that the hearing should be both final and interlocutory and a final decree should be rendered upon the hearing (R. 99). The Court found and held in its opinion on the final decree that the South Carolina statute did not violate the Due Process or Equal Protection clauses of the Fourteenth Amendment (Fourth conclusion of Law, R. 84) and held that these questions were sufficiently dealt with in the *Nutt Company* case, *supra* (R. 57); and further held that Congress had not assumed to control the size and weight of motor vehicles by the enactment of the Motor Carrier Act, 1935 (Third conclusion of law, R. 84, and opinion of the Court, R. 57).

The final Decree of the Court (R. 85) adjudged and decreed:

> "(1) That the defendants, their agents and servants, be and they hereby are, restrained and enjoined from

enforcing against the plaintiffs while they are engaged in interstate commerce on the highways of the State of South Carolina numbered 1, 15-A, 17, 21, 25, 29, and 52, or on such portions of *other federal aid highways* as may be of standard concrete or concrete and asphalt construction, any provision of Act No. 259 of the General Assembly of South Carolina limiting the gross weight of trucks on highways to 20,000 pounds, or providing that a tractor semi-trailer combination shall be considered a single unit for the purpose of determining weight and thereby limiting the gross weight of such combination to 20,000 pounds, or limiting the width of (fol. 103) vehicles to 90 inches, if the vehicle does not exceed 96 inches in width.

"(2) That the provisions of this injunctive order shall not extend to bridges on the highways mentioned in the preceding paragraph where such bridges have not been constructed with sufficient strength to support the heavy trucks of modern traffic or are too narrow to accommodate such traffic safely, provided that the State Highway Department shall erect at each end of any such bridge a proper notice of sufficient size and character to give ample warning that the use of the bridge is forbidden by trucks exceeding the weight or width limit, and further provided that the proper authorities shall take the necessary steps to enforce the law against the use of such bridges by such trucks."

Paragraph (3) of the decree provided that the injunction was denied with respect to the other roads and bridges of the State, and by (5) jurisdiction was retained by the Court for the purpose of making any such changes as to paragraphs one or two of the decree as may hereafter appear to be proper.

It will be noted from Paragraph (1) of the decree, that while the complaint asked for an injunction generally against the enforcement of the Act as to interstate commerce, without referring to any particular numbered or

described highways of the State system, the Court below by its decree undertook to select certain specifically numbered Federal aid highways and "such portions of other Federal aid highways as may be of standard concrete or concrete and asphalt construction" as the subjects of its injunctive relief; and the second paragraph of its decree, excluding therefrom weak or narrow bridges, is conditioned on the performance of certain requirements imposed therein by the Court upon the South Carolina Highway Department.

Summary of Evidence.

Most of appellees' testimony was offered to show the effect of the enforcement of the State statutes upon interstate commerce. The appellants offered no testimony on that issue.

The eighteen witnesses offered by appellees on that question testified, in substance, that the weight and size of trucks used by carriers for hire are important in determining rates, and that the limits imposed by the South Carolina statute will greatly increase rates. They mentioned particularly a number of commodities, including fertilizer, household goods and furniture, lumber, flour, cotton, textile products, produce of truck farmers and vegetable growers, and stocks of chain stores. Witnesses for appellees testified that enforcement of the 20,000 pounds weight limitation will increase the cost of transportation of South Carolina produce to markets in other states, thus putting such produce at a disadvantage in competing with similar produce from states having a higher weight limitation and that the cost of operating the truck decreases per unit of commodity carried as the total pay load increases (R. 100-117; 142-158); that truck competition with railroads has tended to keep the level of rail rates down as to cotton shipped into the Port of Charleston (R. 107).

Vegetable growers in South Carolina ship to markets outside of the State by refrigerator trucks and most of such trucks are too large to comply with the South Carolina weight and width limitations; they are mostly owned in other States and used in all States; that rail service for less than carload lots is more expensive and slower than truck service and that the enforcement of the South Carolina law will put the South Carolina vegetable growers at a disadvantage with those of other States (R. 107-112; 152-153).

One of the plaintiffs, a carrier who operates in all of the forty-eight States, admitted that he was making money, and that in States like Texas, Tennessee and Alabama, in which he could not use his big trucks, he had special equipment complying with the State laws (R. 147). Another witness, employed in the Bureau of Motor Carriers, Interstate Commerce Commission, stated that trucks are still operated in the States of Texas, Kentucky and Tennessee (R. 142). Another of appellees' witnesses testified that the enforcement of the Act would cause large cargoes of freight now coming into the Port of Charleston to be diverted to other ports (R. 100-106; 204-205).

Many figures and much data from public records were offered, and testified to, showing the following uncontradicted facts. In South Carolina, there are approximately 60,000 miles of public roads, of which about 6,100 miles comprise the State Highway System. The roads in the State Highway System are classified as: "standard paving," of which there were (as of June 30, 1936) 2,417 miles; bituminous surfacing of which there were 1,724 miles; earth type roads, of which there were 1,141 miles; and unimproved roads, of which there were 666 miles. The classification of "standard paving", includes pavement that is wholly concrete, asphalt pavement on a concrete base, and

asphalt pavement on asphalt base (R. 159). The pavement wholly of concrete amounts to 1,800 to 2,000 (R. 160) miles. About 40 percent. of the concrete pavement has center joints (R. 178). Some of the pavements are 16 feet wide and some 20 feet wide, but most of them are 18 feet wide (R. 117).

The State Highway System has cost approximately One Hundred and Fifteen Million Dollars (R. 173-174), of which Twenty-nine Million, Seven Hundred and Forty-one Thousand Dollars was received from Federal aid (R. 137). Maps were used by both parties showing the particular roads upon which Federal aid was used (Exhibit 7, R. 254A; Exhibit 6, 300B, 300C). On Federal aid projects the cost was borne partly by the State and partly by the Federal Government, except some short sections which were built entirely by Federal funds (R. 158-159). No one road in the State is in its entirety a Federal aid project, that is to say, portions of the road were built by Federal aid, while other portions were built entirely by State funds (R. 191-192). Exhibit 4 (R. 253) shows the total mileage of completed Federal aid projects to be 2,798.7 miles; of this 795.8 miles are of concrete and 193.5 miles of bituminous concrete, the rest of this mileage being of low type roads. Exhibit 11 (R. 271-272) shows that there are 4,322 miles of road in South Carolina embraced within the approved Federal aid system.

Exhibit 14 (R. 273) gives the total registration of all motor vehicles in the State by years, from 1925 to 1936, and Exhibit 13 (R. 272) gives the trucks registered by rated capacity from 1933 to 1936. In 1936, there was a total motor vehicle registration of 253,488. There were 30,497 trucks registered. Of these 2,639 trucks exceeded two tons capacity, of which *only 328 exceeded three tons*

capacity, and of this 328 *only 19 exceeded four tons capacity*. Carriers for hire use two to three tons capacity semi-trailer outfits of which class 522 were registered in 1933 and 2,306 in 1936; and no other type has increased in proportion (R. 229). The number of vehicles used for hire in intrastate and interstate commerce, and registered with the Public Service Commission of the State, totaled 111 operated by common carriers, and 1,202 operated by contract carriers (R. 230-231). The irregular route common carrier is classed as a contract carrier under South Carolina law (R. 231).

The conflicting testimony was directed primarily to the questions as to whether or not the assailed provisions of the State Act bear any relation to conserving the highways, maintenance costs, traffic control, and safety thereon.

On these main issues, the plaintiffs offered four witnesses. Harry Tucker, Professor of Engineering in North Carolina State College, and Director of the Engineering Experiment Station at Raleigh, N. C., testified that the gross weight of a motor vehicle does not enter into the design of a concrete highway, or its equivalent; that gross weight of a vehicle has nothing to do with conserving the highway or the cost of maintaining it. In his opinion, the only test is the wheel load. He did not know much about the highway system of the State, but had made a trip over some of the concrete roads of South Carolina, looked at them, and saw no evidence of undue deterioration and they were well constructed and drained. A map showing the route he traveled on such trip is appendix VI. He testified that it is almost impossible to say what causes a failure of pavement, especially a concrete pavement, there are so many factors entering into it (R. 125). He was informed by the South Carolina Highway Department that two sections of concrete pavement are used on the roads he examined; one, 7½-6-7½ which means 7½ inches thick at

the edges and 6 inches thick in the center; and the other 8-6½-8. He expressed the opinion that the concrete roads that he examined will carry a wheel load of from 8,000 to 8,500 pounds, or an axle load of 16,000 to 18,000 pounds safely. He said: "As to how we determine that, we have methods developed originally by Mr. Clifford Older, by the Bureau of Public Roads, by Mr. Westergard, of the University of Illinois, by which, knowing the thickness of a pavement and the strength of the concrete out of which it is constructed, we can determine the wheel load, and therefore, the axle load, which that pavement will carry." He further testified that there is no cumulative stress caused in a concrete pavement by the three axles of a tractor-semi-trailer combination; the three axles, if carrying the same load, and if at least 40 inches apart, each causes a stress in the pavement independently of the other axle; the three axles do not increase the stress. Concrete road sections with a minimum thickness at the center of six inches are good for an axle load of 16,000 to 18,000 pounds. With a tractor semi-trailer combination with three axles the concrete pavement will support approximately 40,000 pounds gross; the front axle of the tractor would bear 8,000 pounds, the rear axle of the tractor 16,000 pounds, and the rear axle of the semi-trailer 16,000 pounds. If another axle could be added to the vehicle 40 inches apart from any other axle and let it carry 16,000 pounds more, the gross load could be increased to 56,000 pounds without doing any additional damage to the pavement. He said in his opinion the roads he examined could carry that load (R. 126-127).

He further testified that figures for the whole country on accidents are the following: For passenger vehicles one accident including death or injury per 100,000 miles; for busses 2.66 such accidents; for intercity trucking 1.69 accidents; the accident ratio is higher for trucks engaged in local deliveries (R. 127-128).

Mr. Tucker stated that he considered that the concrete roads of South Carolina will carry the same loads as the North Carolina concrete roads. He said that the North Carolina roads (where the weight limitations are higher) are in much worse condition than those over which he traveled in South Carolina, but he does not consider the condition of the roads in North Carolina to be due to the heavy trucks; there are so many things that cause the deterioration of a concrete pavement that it is impossible to say it is due to this cause or that cause in any case. He would say in North Carolina there are sub-grade conditions quite different from the sub-grade conditions in South Carolina for one thing. From his observation the sub-grade conditions in South Carolina are most excellent. In North Carolina frost goes quite deep and that makes quite a difference as to the qualities of a concrete road. There isn't much depth to the frost in South Carolina (R. 129-130).

L. W. Teller, engineer employed by the Bureau of Public Roads, testified as a witness for the Interstate Commerce Commission. For 10 years he has been in charge of the Bureau's research in pavement design. The Bureau conducts research and tests and the results are published monthly in its research journal "Public Roads". He testified that the concrete pavement in South Carolina is of typical design; that the gross load is not a factor in the design of concrete paving, but that the critical factor is the wheel load. He expressed the opinion that the standard pavement roads in the State could safely bear a wheel load of 8,000 pounds, with proper pneumatic tire equipment (R. 133). He had no knowledge of the design of the roads and bridges in this State (R. 134). He further testified that the standard pavement roads were the only roads the strength of which could be determined by formula or test; the other types must be judged by observation and he does not know the weights that should be permitted

on them (R. 134). He would not say that a gross load limitation has no connection with the protection of the road,, but did state that the 20,000 pounds limit, prescribed by the State statute, would likely limit the maximum wheel load on any type of vehicle to 8,000 pounds, and a few vehicles, loaded to their capacity, could probably carry a wheel load of 8,000 pounds. About one-third of the load is on the front end and two-thirds on the rear (R. 135).

R. W. Knowles, a transportation engineer for a manufacturer of trucks, testified that the tractor semi-trailer type of truck, used in interstate commerce today, is ordinarily designed to carry about 18,000 pounds per axle, or a little less. He expressed the opinion that gross weight does not in any way protect the highways (R. 119) nor was safety on the highways enhanced by such (R. 121). It was his opinion that 40,000 pound trucks could operate as safely as 20,000 pound trucks (R. 122).

C. B. Carley, a trailer salesman, found that he could not operate trucks to come within the limits of the South Carolina Act (R. 155); that South Carolina is the only State that did not permit a width of 96 inches or greater. The States of Florida and North Carolina have recently changed to conform (R. 155). He also stated that Tennessee, Kentucky, Alabama and Texas do not permit a ten ton pay load (R. 155), and expressed the opinion that the gross weight of 20,000 pounds does not relate to safety at all, and implied that the contrary was true (R. 155).

Appellees offered in evidence a portion of a proposed uniform act regulating traffic on highways, prepared and adopted by the National Conference on Street and Highway Safety, as published by the Bureau of Public Roads of the Department of Agriculture in 1934, prescribing that for motor truck vehicles wheel load *should not exceed* 8,000 or 9,000 pounds, and axle load should not exceed 16,000 or 18,000 pounds, depending upon whether the wheels are

equipped with high pressure or low pressure pneumatic tires (R. 277); and prescribing a width of 96 inches for such vehicles. They also offered in evidence along the same lines, recommendations of certain highway associations and others (R. 275-282).

On these issues, the appellants offered three witnesses: J. S. Williamson, Chief Engineer of the State Highway Department; Clifford Older, who originated the first formula used in the designing of concrete paving; and the statement of C. H. Moorefield (now deceased), Chief Highway Engineer from 1920 to 1935, under whom most of the South Carolina highways were constructed, and who testified in the investigation directed by the Legislature in 1931, before the present statute was enacted. Mr. Williamson testified as follows:

In the State highway system there are 2,417 miles of standard pavement, 1,724 miles of bituminous surface type, 1,141 miles of earth type, and 666 miles unimproved (R. 159). The concrete paving is 75 to 80 percent of the total, or 1,800 to 2,000 miles (R. 160). The bituminous surface type is an earth type road covered with an asphalt wearing surface about ¾ of an inch thick. The bituminous surface, earth type, and unimproved roads are quickly impaired and destroyed by heavy truck traffic (R. 161-162-170). There are sections of bituminous surface, earth type and unimproved roads on all roads throughout the State highway system. On some routes there are more weak places than on others (R. 163, 169, 170). There is no definite knowledge as to which roads are traveled most by heavy trucks (R. 163).

There are weak and narrow bridges in many places throughout the State highway system, one not capable of bearing safely more than two tons, one not more than five tons; and of the 50 miles of bridges in the system, 75% have been designed to carry a load not in excess of ten tons (R. 169, 170, 174). There are several bridges 18 feet wide

and one 15 feet wide (R. 164, 167). Trucks have broken floors on bridges from time to time and have knocked hand rails off very often (R. 181).

The load the concrete roads will bear is very indefinite. It depends on a number of different things. Subgrade conditions are a very big factor. Some concrete pavement in one section may hold up 100,000 pounds. The same identical pavement, as far as construction goes, may break up under a two or three thousand pound load. Those subgrade conditions often occur in short distances of one another on the same road (R. 160). Subgrade conditions are about the same in South Carolina as in North Carolina. There is sand subgrade along the coast, some gumbo sections, sand hills, mountainous sections and clay. Frost is sometimes deep enough to disturb some roads (R. 179).

On standard pavement throughout the State the limit of axle weight should be around 13,000 pounds, but there are roads for which that is too much. Greater axle weights are going over the roads now and some of the pavements are failing. Trucks and buses are one cause for such failure, and also subgrade conditions, floods and a little frost. A 16,000 pound axle load is apt to do some damage; the pavement may stand it for a good while but it is bound to break down earlier than if it had a lighter load (R. 187, 188, 195). Under good subgrade conditions the new pavement may support 18,000 pounds axle load but there are weak subgrade conditions, some in short distances of one another on the same roads. Assuming that 90 per cent of the road has no weak spots, axle loads of 12,000 or 13,000 pounds would be heavy enough (R. 179, 160, 182, 187, 189). Maintenance costs amount to one and three-quarter million dollars per annum, no part of which is contributed by the Federal Government (R. 197). The use of bridges for loads exceeding the weights for which they were designed, does not prove their strength (R. 184), and the same is true as to concrete

roads (R. 182, 197). The damage may show up later. Cities and towns of the State have suffered damages to their streets due to the heavy truck traffic (R. 168, 169, 172). Most of these streets were designed only for passenger vehicle traffic (R. 169). The State departed from building standard concrete roads on account of lack of funds, and went to cheaper construction so that they could get people out of the dust and mud (R. 161). (End of Mr. Williamson's testimony.)

Mr. C. H. Moorefield, Chief Engineer of the South Carolina State Highway System prior to July 15, 1935, (now deceased), recommended to the Legislature in 1931 that the truck weight limitation be lowered.

In 1931, the Legislature authorized a committee to investigate motor transportation, and the report of that committee was admitted in evidence (R. 175-176). On November 10th, 1931, Mr. Moorefield appeared before that committee, presented a prepared statement which he had previously submitted as testimony before the Railroad Commission of South Carolina on February 4th, 1931, Exhibit 8 (R. 255-261), and presented also a prepared statement for the investigating committee, Exhibit 9 (R. 261-265). Exhibit 10 is a part of the report of the investigating committee containing their report of Mr. Moorefield's testimony. He stated that if the highways could be designed for a maximum vehicle load not exceeding four tons, which would take care of the ordinary truck having two tons capacity, the average cost per mile of construction would be reduced by at least $3,000 and probably more. The total number of trucks registered for more than two tons capacity plus all busses is about one per cent of all vehicles registered, while the additional $3,000 per mile of highway construction cost in order to provide for this one per cent amounts to 15 per cent of the average per mile construction cost. This means that the State is expending $18,000,000 to accommodate

3,000 vehicles and combinations of vehicles (R. 256-257). Roads which have a small volume of truck traffic have a much lower maintenance cost than roads where there is a large volume of truck traffic (R. 257). Damage caused roads by vehicles is out of proportion to the weight of the vehicles; that is, a five-ton truck will do more than five times the amount of damage that a one-ton truck will do (R. 258). The large and heavy trucks appear to be involved in proportionately more accidents than ordinary vehicles and interfere to a marked extent with the free use of the highways by other vehicles (R. 258-259); they enhance the problem of traffic out of all proportion to the relative number of such vehicles; that even on our 20 foot pavements the average driver of an automobile hates to meet a bus or a large truck and is conscious of being crowded to one side whenever he passes one (R. 259). He recommended to the Legislature that no vehicle with a load capacity greater than five tons should be permitted to be registered (R. 264). The increasing bus and truck traffic is objectionable to the great majority of highway users and the South Carolina highways are not in shape to bear all of the traffic that would be thrown upon them if legislative action encouraged further even gradual substitution of highway carrier service for rail service.

Clifford Older, of Chicago, consulting engineer, testified for appellants as follows:

He was employed by the Illinois Highway Department as an engineer from 1906 to 1917, and as Chief State Highway Engineer from 1917 to 1924. He conducted a test of concrete pavements, known as the Bates test, and devised the first practical formula for concrete pavement design (R. 232). There is no formula to test the strength of any road except a concrete road (R. 239). It is impossible to tell the strength of concrete pavement merely by looking

at it, even though its thickness and width is known. Concrete pavements of the same thickness vary considerably in bearing power. The soil on which it is laid has a good deal to do with it (R. 233-234). A concrete pavement should not bear weight of more than fifty per cent of the ultimate bearing strength. If the stress is ninety per cent the failure will appear almost immediately. If the load stress is a little over fifty per cent, say fifty-five per cent, the failure will not result for a number of years. Stresses of sixty per cent of the ultimate bearing strength cause the road to break within a comparatively short time (R. 235).

The strength of subgrade varies in different parts of the State and even in the same territory approximately. It varies at short intervals along the particular piece of road (R. 235).

Part of the South Carolina concrete pavement does not have longitudinal joints. Pavements having a center thickness of 6½ inches with no longitudinal joint are the weakest in the State. Nature will put a longitudinal crack in it which will separate during low temperature periods. This leaves an unsupported edge 6½ inches thick exposed to the wheels of traffic. Pavements of this kind are not capable of supporting indefinitely wheel loads in excess of 4,200 pounds or axle loads in excess of 8,400 pounds. Pavements having an 8 inch edge thickness, 7½ inch center thickness, and transverse joints should not bear greater wheel loads than 6,400 pounds or axle loads of 12,800 pounds; that is the actual load supporting capacity of the best type of concrete pavement in the State (R. 237-238).

The maximum axle load of 18,000 pounds permitted in many States is an excessive load. In the State of Illinois he built $100,000,000.00 worth of pavement designed to carry a 16,000 pound axle load, 8,000 pound wheel load. Many of those pavements have gone to pieces under such loads, they have been destroyed by the travel. Some of

those roads so destroyed were of approximately the same construction as the South Carolina roads (R. 238). Some are still in service. The witness stated that the whole time he was with the Illinois Highway Department, solid tires were used on those roads, but he observed that the destructive effect of the loads (on the roads) continued just the same after pneumatic tires came into use and, in his judgment, the use of solid tires, as contrasted with the use of pneumatic tires, had nothing to do with the deterioration of the highways (R. 249-250). That is why he wants to be conservative in estimating the bearing strength of a pavement (R. 238). Bituminous surface and earth type roads should be restricted to the use of the average passenger car or truck of equivalent weight and tire equipment (R. 239-240).

The weight of a vehicle has direct relation to its safety. Even though a heavy truck can stop in the same distance as a light car, if both going at the same speed should strike an object, the damage done by the heavier vehicle will be in proportion to its weight as compared with the light vehicle (R. 240).

The width of a vehicle is a factor in the difficulty of passing it from the rear. Where a vehicle is in front of you it is easier to see ahead past the left edge of that vehicle where it is narrow than where it is wide. The angle of vision ahead is cut off in proportion to the width of the vehicle ahead. Six inches in the width of a truck would make a great difference.

The gross load limitation of 20,000 pounds is decidedly generous for the roads of this State. The gross load limitation has relation to the preservation and protection of the highway. If commercial vehicles have three axles the 20,000 pounds gross weight limitation would put the axle weights down to reasonable limits with respect to the

carrying capacity of the roadways of the State. It is difficult to enforce highway laws. A gross load limitation law is easier to enforce than an axle load limitation. For a part of the time while he was Illinois State Highway Engineer he had the direction of the highway police and both methods of enforcement were tried (R. 244). This witness did not agree with any statement that the main standard highways of South Carolina would carry axle weights of 18,000 pounds (R. 250). He stated: "In my experience as an engineer in the years past, working for the State of Illinois, I have never contemplated that the roads of this country would be subjected to the burdens that are now being imposed on them by heavy trucks" (R. 242-243). (End of Mr. Older's testimony.)

Specifications of Assigned Errors Relied On.

There are thirty assignments of error (R. 68-96). According to appellants' view, the "Findings of Fact", the "Conclusions of Law", and the "Opinion" of the court below are permeated with error, and in order for appellants to preserve their rights it was necessary for them to make all of these assignments. The assignments are intended to put in issue all findings and conclusions which are inconsistent with appellants' position as advanced in the court below, and to preserve the record intact for that purpose. Appellants intend, therefore, to urge all the assignments, without discussing them *seriatim*, and believe that with the foregoing explanation and the following classification of the assignments, consideration of them will not be unduly burdensome.

Proposition I.

The court below erred in holding the weight and width limitations of the South Carolina statute to be an unreasonable burden upon interstate commerce and, therefore, un-

constitutional, in that its decree is based upon sharply conflicting evidence of experts as to the reasonableness of such limitations and upon opinion testimony, largely immaterial, and in part contrary to facts judicially known; and thus its decision, under settled law, encroaches upon the legislative discretion.

Under this proposition appellants will rely on and argue Assignments of Error numbered 1, 2, 12, 14, 15, 17, 18, 19, 22, 24, 25, 27, 28 and 30 (R. 88 to 96).

Proposition II.

The record evidence, read with facts judicially known, fails to sustain the findings of the District Court that the said weight and width limitations have no reasonable relation to the safety and protection of the State's highways and constitute an unreasonable burden on interstate commerce, and affords no proper basis for the action of the Court in imposing its own selective restrictions and permissions in disregard of the legislative judgment.

Under this proposition appellants will rely on and argue their Assignments of Error numbered 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, and 16 (R. 88 to 93). The Findings of Fact mentioned are found in the record at pps. 76 to 84.

Proposition III.

Neither the fact of Federal aid contributions, under the Federal Highway Act, nor the enactment of the Motor Carrier Act, 1935, as construed by the court below considered separately or together, with the other circumstances relied on by the court, sustain its findings that the State act violates the commerce clause.

Under this proposition appellants will rely on and argue Assignments of Error numbered 11, 15, 17, 19, 20, 21, and 22 (R. 91, 92, 93 and 94).

Brief Summary of Argument.

The gist of appellants' argument under the three propositions of this brief is largely stated or suggested by the captions or headings under the respective propositions.

Under Proposition I appellants argue that the evidence in the record, read in connection with necessary presumptions of law or fact and matters which this Court will judicially notice, is substantially, and even sharply, conflicting on the question of whether the statutory gross weight limitation has any reasonable relation to the preservation and safety of the highways, and on the question of whether the 20,000 pound gross weight limitation and the 90 inch width limit imposed by the South Carolina statute is reasonable; and appellants further argue that, in view of the debatable nature of these questions, the court below improperly invaded the province of the Legislature in considering these questions and holding the State statute to be unreasonable in these respects. Appellants contend that the lower court's action in so holding was directly contrary to the decision of this Court in *Sproles* v. *Binford,* 286 U. S. 374, and other decisions cited herein, and, in this connection, show that the facts in evidence in the *Sproles* case, as appears from the record therein, are substantially identical with the facts proved in this case. The contentions also were largely the same in both cases.

Appellants also contend under their first proposition that the findings and decree of the court below further invade the province of the Legislature by adjudicating matters which are substantially legislative or administrative in character, in that its decree, in effect, struck down the weight limitation fixed by the South Carolina statute and permits interstate vehicles of any weight to operate on certain specified highways, and also held a 90 inch vehicular width limit invalid and itself fixed a width limit of 96 inches; and

in that the injunction decree also takes away from the State and its authorities power to regulate its admittedly weak bridges, unless the State complies with conditions laid down in the decree.

Under Proposition II appellants consider and discuss the evidence in the record bearing on certain important questions of fact, as to which the court below made findings of unreasonableness. These questions with matters incidentally connected therewith are:

(a) That the effect on the highways and bridges of a tractor-semi-trailer combination is not different from the effect produced by two vehicles of equal weight immediately following each other, which was made the basis of a holding that the statute requiring that a tractor-semi-trailer combination be considered as one unit, is unreasonable;

(b) Findings that the specifically enumerated highways contain only a few short stretches of sub-standard highway and a few weak bridges;

(c) Findings that a gross load limitation has no reasonable relation to conservation and safety of highways and that a gross weight limitation of 20,000 pounds is unreasonable; and

(d) a finding that a 90 inch vehicular width limitation is unreasonable.

Appellants contend and attempt to show from the evidence that the court's findings on all of these questions is not sustained by the weight of the evidence.

Appellants also point out that the record is silent as to a number of facts and matters which materially bear upon the question of reasonableness of the 20,000 pound gross weight limitation fixed by the statute, and appellants call attention to material information and data, particularly relating to highway subgrade conditions, contained in official publications and other sources of which the Court will

take judicial notice. Appellants contend that the existence of these material facts accentuates the insufficiency of the evidence to support the court's material findings.

Appellants contend under their Proposition III that the record indicates that the court below gave material and preponderant weight to the fact of Federal-aid contributions made under the Federal Highway Act in the construction and maintenance of the highways in question, and will contend that neither the fact of such Federal-aid contributions, nor the enactment of the Motor Carrier Act, 1935, as construed by the court below, justify the court's finding and holding that the State Act violates the Commerce Clause, whether these Federal statutes are considered by themselves or together, or in connection with any other facts in the record. Appellants further argue under this proposition that the court below erroneously held that the enforcement of the South Carolina statute in question constituted a *direct* burden on interstate commerce, whereas appellants contend that this statute was admittedly enacted under the well-recognized police powers of the State and that any effect it had on interstate commerce was merely incidental and indirect. Appellants further contend that the court below misapplied several of the decisions of this Court, such as the case of *Buck* v. *Kuykendall* and *Bush & Sons Co.* v. *Maloy, infra,* in that those cases involved a direct burden on interstate commerce, irrespective of any Federal legislation, and are inapplicable to this case, as is the case of *N. C. & St. L. R. R. Co.* v. *Walters, infra,* also relied on by the court below.

Proposition I.

The court below erred in holding the weight and width limitations of the South Carolina statute to be an unreasonable burden upon interstate commerce and, therefore, unconstitutional, in that its decree is based upon sharply

conflicting evidence of experts as to the reasonableness of such limitations and upon opinion testimony, largely immaterial, and in part contrary to facts judicially known; and thus its decision, under settled law, encroaches upon the legislative discretion.

Under this proposition appellants will rely on and argue Assignments of Error numbered 1, 2, 12, 14, 15, 17, 18, 19, 22, 24, 25, 27, 28 and 30 (R. 88 to 96).

The evidence before the court below, and upon which it made its findings, consisted of two classes.

First. Evidence which was unchallenged, to the following effect:

(a) That other States have greater weights and widths.

(b) That rates would be higher and hauling more expensive, and business would be diverted from South Carolina.

Second. Sharply conflicting evidence, based largely upon opinion of experts, upon the following points:

(c) That some of the roads in South Carolina can withstand a greater weight limit than 20,000 pounds.

(d) That the gross weight and width limitation has no relation to conserving the highways or in promoting safety.

(e) That lighter trucks are more unsafe than heavier ones.

This is the same kind and character of evidence that was introduced in *Sproles* v. *Binford*, 286 U. S. 374. In that case, upon such conflicting testimony, this Court upheld the Texas statute.

1. *There is a presumption that a State in enforcing its local policies will conform its requirements to the Federal Constitution; or, in other words, there is a presumption that an Act of a State Legislature is valid.*

It was incumbent upon plaintiffs below, appellees here, to show that the State statute created an unreasonable and arbitrary burden against their interstate business. It must be borne in mind at the outset that the South Carolina Act falls alike on interstate and intrastate commerce. There is no discrimination *per se*. The enforcement of the law is the same as to both interstate and intrastate commerce. The requirements of the Act are the same as to each class of commerce. Under well known decisions of this Court all doubts must be resolved in favor of, and not against, the State. The presumption is that the statute is valid.

Corporation Commission v. *Lowe,* 281 U. S. 431, 438;
Wampler v. *LeCompte,* 282 U. S. 172, 174, 175.

2. *The statute was adopted after appointment of a committee and a full public hearing.*

In *Pacific States Box & Basket Company* v. *White,* 296 U. S. 176, 186, the court, in upholding the statute in that case, said:

> "Here there is added reason for applying the presumption of validity; for the regulation now challenged was adopted after notice and public hearing, as the statute required."

3. *The statute is a valid exercise of the police power of the State and is not unreasonable, arbitrary or capricious.*

The evidence was sharply conflicting as to whether gross weight and width limitation had any relation to conserving the highways and to safety, and as to whether light trucks were more unsafe than heavy ones, and as to whether the roads in South Carolina could withstand a greater weight limit than 20,000 pounds.

The prayer in the bill is a general prayer for an injunction restraining the State officers from enforcing the statute as to plaintiffs while engaged in interstate commerce,

and is not limited to any particular highways. The decree, to the contrary, limited the injunction to specific numbered highways, 1, 15-A, 17, 21, 25, 29 and 52, "or on such portions of *other Federal aid highways* as may be of standard concrete and concrete and asphalt construction", and restrained the enforcement of "any provisions of the Act limiting the gross weight of trucks on highways to 20,000 pounds, or providing that a tractor-semi-trailer combination shall be considered a single unit for the purpose of determining gross weight and thereby limiting the gross weight of such combination to 20,000 pounds, or limiting the width of such vehicle to 90 inches, if the width of the vehicle does not exceed 96 inches". The decree further provided that the provisions of the injunction order shall not extend to bridges on the highways mentioned where such bridges have not been constructed with sufficient strength to support the heavy trucks of modern traffic (without limiting any weight) or are too narrow to accommodate such traffic safely, and that the State Highway Department should erect at each of such bridges a notice of sufficient size and character to give ample warning that the use of the bridge is forbidden to trucks exceeding the weight or width limit.

The court undertook to set up its judgment for that of the Legislature, and further undertook to vary the terms of the statute. It fixed its own regulations to be obeyed by the South Carolina authorities, contrary to the regulations established by the Legislature. The court, in so doing, invaded the province of the Legislature and went beyond the authority conferred upon it.

The court permitted testimony of the plaintiffs that light trucks are more unsafe on the highways than heavy ones (R. 117), and this under objection of the defendants below (R. 101, 210).

This was purely opinion evidence and contrary to decisions of this Court. Courts have taken judicial notice that the fact is contrary to this testimony.

People v. *Linde*, 341 Ill. 269;
Buck v. *Kuykendall*, 267 U. S. 307, 315;
State v. *John P. Nutt Co., Inc.*, 180 S. C. 19.

The construction of this statute was before the Supreme Court of South Carolina in *State ex rel. Daniel, Atty. Gen.*, v. *John P. Nutt Co., Inc., et al.*, 180 S. C. 19. In that case the defendants contended that this same statute violated the due process clause of both the State and Federal Constitutions and the commerce clause of the Federal Constitution, Article I, Section 8, clause 3. The court held that the statute violated none of these articles of the Constitution, and said:

> "The police power of the State concerning the highways has not been impaired by the federal aid statutes. The state may prescribe regulations adapted to conserve its highways as to cost of construction and maintenance, to reasonably restrict their use in favor of normal traffic, and to promote the safety of all who may use them. That there is a direct relation between the weight and size of motor vehicles and the consequent damage to the highways resulting from their use, and the consequent damage to others from their operation, is no longer open to controversy, and reasonable regulations in this respect are within the police power and entirely within the legislative domain. It is recognized that the commerce clause of the Federal Constitution goes merely to the extent of inhibiting such regulations as result in discrimination against motor vehicles used in interstate commerce, and does not restrict the state in the exercise of its police power in this respect, so long as the statute applies equally to all. *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285; 55 S. Ct. 709; 79 L. Ed. 1439. *Sproles* v. *Binford*, 286 U. S. 374; 72 S. Ct. 581; 76 L. Ed. 1167;

Continental Baking Co. v. *Woodring,* 286 U. S. 352; 52 S. Ct. 595; 76 L. Ed. 1155; 81 A. L. R. 1402; *Morris* v. *Duby,* 274 U. S. 135; 47 S. Ct. 548; 71 L. Ed. 966; *State* v. *Hicklin,* 168 S. C. 440; 167 S. E. 674, affirmed *Hicklin* v. *Coney,* 290 U. S. 169; 54 S. Ct. 142; 78 L. Ed. 247; *Ashland Transfer Co.* v. *State Tax Commission,* 247 Ky. 144; 56 S. W. (2d) 691; 87 A. L. R. 534; *State* v. *Wetzel,* 208 Wis. 603; 243 N. W. 768; 86 A. L. R. 274; *Contract Cartage Co.* v. *Morris,* (D. C.) 59 F. (2d) 437."

That case is supported by the decisions of this and other courts cited therein. This Court, in several decisions, has held that state statutes limiting the weights, heights, lengths and widths of motor vehicles, equally uniform in their application to interstate and intrastate commerce, cast no burden on interstate commerce or traffic, and do not violate Section 8, Article I, of the Constitution of the United States. The principles upon which such decisions rest have been enunciated in many cases.

Aero Mayflower Transit Co. v. *Georgia Public Service Commission,* 295 U. S. 285, 55 S. Ct. 709, 79 L. Ed. 1439;

Sproles v. *Binford,* 286 U. S. 374, 72 S. Ct. 581, 76 L. Ed. 1167;

Continental Baking Co. v. *Woodring,* 286 U. S. 352, 52 S. Ct. 595, 76 L. Ed. 1155, 81 A. L. R. 1402;

Morris v. *Duby,* 274 U. S. 135, 47 S. Ct. 548, 71 L. Ed. 966, 967;

Hicklin v. *Coney,* 290 U. S. 169, 54 S. Ct. 142, 78 L. Ed. 247;

Hendrick v. *Maryland,* 235 U. S. 610;

Clark v. *Poor,* 274 U. S. 554, 71 L. Ed. 1199;

Bradley v. *Public Utilities Commission of Ohio,* 289 U. S. 92;

Kane v. *New Jersey,* 242 U. S. 160;

Stephenson v. *Binford,* 287 U. S. 251;

Hess v. *Pawlosky,* 274 U. S. 160.

In *Sproles* v. *Binford, supra,* the Court, in upholding the Texas statute, speaking through Mr. Chief Justice Hughes, said:

> "In exercising its authority over its highways the State is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the State may also prevent the wear and hazards due to excessive weight of load. *Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the 14th amendment was intended to secure. Ohio Oil Co.* v. *Conway,* 281 U. S. 146, 159; 74 L. Ed. 775, 781; 50 S. Ct. 310. *When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. Standard Oil Co.* v. *Maryville,* 279 U. S. 582, 586; 73 L. Ed. 856, 860; 40 S. Ct. 430; *Price* v. *Illinois,* 238 U. S. 446, 452; 59 L. Ed. 1400; 35 S. Ct. 892; *Hadacheck* v. *Sebastian,* 239 U. S. 394, 410; 60 L. Ed. 348, 356; 36 S. Ct. 143; Ann. Cas. 1917B, 927; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388; 71 L. Ed. 303, 310; 54 A. L. R. 1016; 47 S. Ct. 114; *Zahn* v. *Board of Public Works,* 274 U. S. 325, 328; 71 L. Ed. 1074; 47 S. Ct. 594. Applying this principle, this Court in *Morris* v. *Duby,* 274 U. S. 135; 71 L. Ed. 966; 47 S. Ct. 548, sustained the regulation of the Highway Commission of Oregon, imposed under legislative authority, which reduced the combined maximum weight in the case of motor trucks from 22,000 pounds, which had been allowed under prior regulations, to 16,000 pounds. See also *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 73; 74 L. Ed. 704, 709; 68 A. L. R. 194; 50 S. Ct. 204. The requirement in *Morris* v. *Duby,* related to the *gross load*

limit, but we know of no constitutional distinction which would make such legislation appropriate and deny to the State the authority to exercise its discretion in fixing a net load limit. We agree with the District Court that the limitation imposed by Section 5 of the statute does not violate the due process clause." (Italics ours).

Under the facts and testimony herein, which have been fully set out in our Statement of the Case, appellants think that the *Sproles* case, *supra*, read in the light of the evidence in the record in that case and the contentions there made, is of itself absolutely determinative of the instant case and requires the reversal of the decree appealed from.

We have carefully examined the record and briefs filed in this Court in that case, and the record shows that the plaintiffs' evidence therein was exactly similar, both in kind and character, to appellees' evidence in the instant case. Plaintiffs' evidence in that case consisted of the following: first; that the Texas statute there assailed which imposed a 7,000 pound net weight limitation, repealed a prior law which had permitted a gross load of 30,000 pounds, provided the axle load did not exceed 16,000 pounds; second, there was testimony by several engineers, one from the U. S. Bureau of Roads, that a net load limitation had no real relation to highway preservation and was unreasonable and arbitrary, because damage to the highway could only be prevented by laws which prescribed maximum wheel and axle weights (precisely the position taken by appellees' witnesses here); that the repealed law (permitting a 30,000 pound gross load, with a 16,000 pound axle limitation) adequately protected the highways and was similar to the laws of most of the other states (again identical with the contentions of appellees herein). The testimony of the Chief of the U. S. Bureau of Public Roads, Mr. Thomas H. McDonald, before the Interstate Commerce Commission, which is found on page 281 of the record in this case, was also introduced in the

Sproles case. In fact, the record in the *Sproles* case contains all of the highway engineering and expert testimony introduced by appellees in this case, but more engineers testified in the *Sproles* case and the evidence also touched on certain features not specifically mentioned in the present case; third, there was much evidence in the *Sproles* case, as here, that the enforcement of the Texas statute would cause great loss to motor vehicle carriers and shippers. This was largely or entirely undisputed. Further, the District Court in that case found that the carriers who had operated in interstate commerce profitably under the old law, would operate their vehicles at a loss under the 7,000 pound net weight limitation, and also specifically found that trucks used in neighboring States could not be used in Texas under the new law, which would require the transfer of the cargo to smaller trucks at the state line. This evidence and these findings of the Texas Court are duplicated in the instant case. See Findings of Fact 7, 8, 9 (R. 78); 10, 11, 12 and 13 (R. 79); 14 and 15 (R. 80); and 16 (R. 81).

Thus, excepting the small amount of evidence in the instant case as to what highways of the state had received Federal aid, the evidence in the two cases is identical in kind and character. This Court, in the *Sproles* case, held that evidence that compliance is burdensome to operators on the highway and will cause highway users serious loss, is immaterial.

The question of the reasonableness of the weight limitation in the Texas case was, as this Court held, debatable, because the evidence thereon was conflicting. The same is true herein. The evidence on the strength of the South Carolina highways, on the reasonableness of a 20,000 pound gross weight limitation, and on whether a gross weight limitation has any reasonable relation to the protection of the highways, is sharply conflicting. Indeed, appellants

earnestly contend, and undertake to show in the next subdivision of this brief, that the District Court's Findings of Fact on this and other vital questions of fact are distinctly against the weight of the evidence, but this is immaterial for the purposes of the question now under discussion. It is enough to require the statute to be upheld that the evidence reasonably makes the question debatable. At the very least, the evidence heretofore set out indubitably shows that the questions of reasonableness, on which the District Court made adverse findings, are clearly debatable, because of the conflicting evidence thereon and the different inferences which may be drawn from the evidence.

However, the opinion of the Court below is strangely silent on this phase of the holding of the Court in the *Sproles* case, notwithstanding the emphatic language of the opinion bearing directly on it which we have herein above set out. The opinion of the court below does not even mention or notice that there is a conflict of evidence, and even a sharp conflict, on all of these questions. Indeed, in reading the opinion of the Court below, one having no knowledge on the subject would infer there was no conflicting evidence at all in this regard as to the reasonableness of the gross weight limitation involved, or the other facts found by the Court, and might even suppose from its opinion that the unreasonableness of such limitation was clearly condemned by universal experience and by all scientific knowledge. The Court below in its opinion (R. 73), says: "In the light of experience and of scientific knowledge, there is no ground for reasonable difference of opinion as to the gross load limitation of 20,000 pounds not being necessary for the protection of such roads themselves." It is unnecessary, at this point, to burden the brief with repeated quotations from the evidence. It is all set out in the summary of the evidence, *supra*, and even a casual reading of it shows "as plain as Holy Writ" that the evidence

on these questions of fact and reasonableness is clearly conflicting.

For this reason alone, we repeat, the opinion and decree of the Court below is palpably erroneous.

In *Morris* v. *Duby, supra*, at page 143, in an opinion by Mr. Chief Justice Taft, the Court said:

> "An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the state its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use applicable alike to vehicles moving in interstate commerce and those of its own citizens."

A state legislature is entitled to its own judgment in passing upon bills before it. That judgment is not to be superseded by a verdict of a jury or the personal opinion of Judges upon the issue which the Legislature has decided. It is not within the province of the Court to arbitrate such questions. It makes no difference that the facts supporting the legislative discretion may be disputed by argument or opinion of serious strength. The action of the Legislature upon such debatable questions is wholly within the power of the Legislature and furnishes no ground for the intervention of a court. When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action, within its range of discretion, cannot be set aside because com-

pliance therewith is burdensome and the cost of operation would be increased.

Rast v. *Van Deman & Lewis Co.*, 240 U. S. 342;
Bunting v. *Oregon*, 243 U. S. 426;
Hebe Co. v. *Shaw*, 248 U. S. 297;
Sproles v. *Binford*, 286 U. S. 374;
Standard Oil Co. v. *Maryville*, 279 U. S. 582;
State v. *Mayo*, 106 Me. 62.

In *Rast* v. *Van Deman & Lewis Co.*, *supra*, the Court said:

> "It is established that a distinction in legislation is not arbitrary, if any state of facts reasonably can be conceived that would sustain it and the existence of that state of facts at the time the law was enacted must be assumed. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength. It is not within the competency of the courts to arbitrate in such contrariety."

In the case of *Bunting* v. *Oregon*, *supra*, the Court said:

> "But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or to be convinced of the wisdom of its exercise. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid as its prohibition might be, is no impeachment of its legality. This may be a blemish, giving opportunity for criticism, and difference in characterization, but the constitutional validity of legislation cannot be determined by the degree of exactness of its provisions or remedies. New policies are usually tentative in their beginning, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect from the legislative brain. Time may be necessary to fashion

them to precedent customs and conditions and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal."

In the case of *Hebe Co.* v. *Shaw, supra,* the Court said:

"If the character or effect of the article as intended to be used be debatable, the legislature is entitled to its own judgment, and that judgment is not to be superseded by the verdict of the jury, or, we may add, by the personal opinion of judges upon the issue which the legislature has decided."

In the case of *Standard Oil Co.* v. *Maryville, supra,* the Court said:

"We may not test in the balances of judicial review the weight and sufficiency of the facts to sustain the conclusion of the legislative body, nor may we set aside the ordinance because compliance with it is burdensome."

Euclid v. *Ambler Realty Company,* 270 U. S. 365.

In the *John P. Nutt Company* case the Supreme Court of South Carolina not only upheld the statute as against an objection that it violated the commerce clause of the constitution, but said:

"The Court here judicially knows that the facts exist, bringing the legislative power into play."

The holding by this Court in the case of *O'Gorman & Young* v. *Hartford Fire Insurance Co.,* 282 U. S. 251, 258, is peculiarly applicable. The Court said:

"As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. It does not appear upon the face of the statute, or from any facts of which the

court must take judicial notice, that in New Jersey evils did not exist in the business of fire insurance for which this statutory provision was an appropriate remedy. The action of the legislature and of the highest court of the state indicates that such evils did exist."

In *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 185, the Court had before it a suit to enjoin the enforcement of an order of a State department of agriculture prescribing a certain type of container for marketing berries. The State department of agriculture was vested with authority to prescribe such standard containers. The point was made that the order was so arbitrary and capricious as to violate the due process clause of the Fourteenth Amendment. The Court said:

"The order here in question deals with a subject clearly within the scope of the police power. See *Turner* v. *Maryland,* 107 U. S. 38; 27 L. Ed. 370; 2 S. Ct. 44. When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of the state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary.' "

The latest expression on this subject which we have found is in *Old Dearborn Distributing Company* v. *Seagram-Distillers Corporation,* No. 372, October Term, 1936, L. Ed. Advance Opinions, Vol. 81, No. 3, p. 130, 137. This Court, speaking through Mr. Justice Sutherland, said:

"There is a great body of fact and opinion tending to show that price cutting by retail dealers is not only injurious to the good will and business of the producer and distributor of identified goods, but injurious to

the general public as well. The evidence to that effect is voluminous; but it would serve no useful purpose to review the evidence or to enlarge further upon the subject. True, there is evidence, opinion and argument to the contrary; but it does not concern us to determine where the weight lies. We need say no more than that the question may be regarded as fairly open to differences of opinion. The legislation here in question proceeds upon the former and not the latter view; and the legislative determination in that respect, in the circumstances here disclosed, is conclusive so far as this court is concerned. Where the question of what the facts establish is a fairly debatable one, we accept and carry into effect the opinion of the legislature."

When the court below undertook consideration of this case it had before it the findings of the Legislature of South Carolina, the decision of the highest court of that State, including its judicial findings, and a denial of certiorari by this Court. This Court has consistently applied the rule that the combined decision of the Legislature and the highest court of a State on local conditions is of great weight on such question.

We quote from *Laurel Hill Cemetery* v. *State and County of San Francisco,* 216 U. S. 358, 365, cited with approval in the recent case of *Nashville, C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, 433:

"But whatever the tribunal, in questions of this kind great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. *Dobbins* v. *Los Angeles,* 195 U. S. 223, 49 L. Ed. 169, 25 Sup. Ct. Rep. 18; *Lochner* v. *New York,* 198 U. S. 45, 58, *et seq.,* 49 L. Ed. 937, 942, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133. But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the

great reluctance that it feels to interfere with the deliberate decisions of the highest court of the state whose people are directly concerned. *Welch* v. *Swasey,* 214 U. S. 91, 106, 53 L. Ed. 923, 930, 29 Sup. Ct. Rep. 567. The reluctance must be redoubled when, as here, the opinion of that court confirms a specific determination concerning the same spot, previously reached by the body that made the law. See *French* v. *Barber Asphalt Paving Co.,* 181 U. S. 324, 341, 45 L. Ed. 879, 888, 21 Sup. Ct. Rep. 625; *Smith* v. *Worcester,* 182 Mass. 232, 234, 235, 59 L. R. A. 728, 65 N. E. 40."

It was not for the court below to say what the law of South Carolina should be, or to overthrow a statute enacted by the State under its recognized police power, merely because the court had different ideas as to what the regulations should be. The weight limitation in *Morris* v. *Duby, supra,* related to the gross load limit, while that in the *Sproles* case, *supra,* related to the net load limit. Neither of them involved a wheel or axle weight limitation, yet both statutes were upheld by this Court.

If the statute is reasonable *per se,* and it has been so held in the *Nutt* case, *supra,* to make it an unreasonable burden upon interstate commerce evidence must be advanced to show that the Legislature acted in an arbitrary or capricious manner, or that the statute, as applied to interstate commerce, is capricious or arbitrary. There is no evidence in the record to this effect. The statute applies equally to trucks engaged in intrastate commerce as well as to trucks engaged in interstate commerce. All that the evidence tends to show and all that the witnesses testified to was that it would make the transportation more costly and increase the rates and that in some instances shipments would have to be transferred at the border of South Carolina, and business would be diverted from South Carolina points to other States. The authorities which we have

already cited show this does not make the Act unreasonable.

In the *Duby* case, *supra*, at page 144, the Court said:

> "The mere fact that a truck company may not make a profit unless it can use a truck with load weighing 22,000 or more pounds does not show that regulation forbidding it is either discriminatory or unreasonable. That it prevents competition with freight traffic on parallel steam railroads may possibly be a circumstance to be considered in determining the reasonableness of such a limitation, but that is doubtful, but it is necessarily outweighed when it appears by decision of competent authority that such weight is injurious to the highway for use of the general public and unduly increases the cost of maintenance and repair."

In *Euclid* v. *Ambler Realty Co.*, *supra*, the Court said, page 389:

> "If it be a proper exercise of the police power to regulate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow to the injury of the residential public if left alone, to another course where such injury will be obviated."

Erie Railroad Company v. *Board of Public Utility Commissioners*, 254 U. S. 394;
Hadacheck v. *Sebastian*, 239 U. S. 943;
Commonwealth v. *Mulhall*, 162 Mass. 517;
State ex rel Bonstell v. *Allen*, 83 Fla. 218.

The District Court further held, on motion to dismiss that the State statute is not violative of the due process and equal protection clauses of the Fourteenth Amendment, and expressly adopted the opinion of the State Supreme Court in *State* v. *Nutt*, *supra*, on those questions (R. 57). In so holding, and in also holding that the statute was unreasonable and invalid under the commerce

clause, as to the numbered highways, we think it clear that the court below has held that the State statute is both reasonable and unreasonable, at the same time, and under the same circumstances. If the statute is reasonable under the Fourteenth Amendment, we submit that it is reasonable under the commerce clause; it being conceded that the statute, on its face, does not discriminate against interstate commerce. Evidently, the District Court based its distinction upon the erroneous notion that a State statute, enacted pursuant to the reserved police power, is unreasonable, if it incidentally burdens or affects interstate commerce. It would be well here to compare the facts and the law in this case to the facts and the law in the *Erie* case, *supra*. There the Board of Public Utility Commissioners directed a change in fifteen places in the City of Paterson where the Erie Railroad crossed that number of streets at grade. The railroad was ordered to make the change by carrying fourteen of the crossings under and one at Madison Avenue over the Railroad. It also had to bear the cost, subject to a charge to the Public Service Railway Company, of 10 per cent of the cost of changing three crossings used by its road. It showed that it did not have assets sufficient to make the changes, at least without interfering with the proper development of its interstate commerce, and also contended that the whole evidence did not justify the finding of the board that the crossings were dangerous to public safety, but at most showed that the change would be a public convenience. It alleged that it is not reasonable to require an expenditure for such a purpose of over $2,000,000.00 from a company that has not more than $100,000.00 available, and that the order and the statute, when construed to justify it, not only interfere unwarrantably with interstate commerce, and impair the obligations of contracts, but take the railroad company's property without due process of law.

Most of the streets concerned were laid out later than the railroads, and this fact is relied upon, so far as it goes, as an additional reason for denying the power of the State to throw the burden of this improvement upon the railroad. The Court, through Mr. Justice Holmes, said:

> "Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires."

Likewise, it can be said in this case as between trucks and the highways of South Carolina the latter represent the more important interest of the two. They always are the necessity of the whole public, while the heavy trucks, important as they are, hardly can be deemed important to the same extent. Being places to which the public is invited, and which it necessarily uses, the State, in the care of which this interest is, and from which, ultimately, the

trucks derive their right to occupy the land, has a constitutional right to insist that its highways shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. The authority of the trucks to project their moving masses across highways must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires.

Again, and on the same page, the Court said:

> "It is said that if the same requirement were made for the other grade crossings of the road, it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. * * * To engage in interstate commerce the railroad must go on to the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens. Contracts made by the road are made subject to the possible exercise of the sovereign right. * * * If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce."

Here the Court has improperly taken into consideration in rendering its decree the additional cost to the merchants, shippers, vegetable growers and motor carriers resulting from the limitations fixed by the statute.

If the State might be so foolish as to make reasonable regulations which may divert traffic from the State, impose upon its citizens and those who use its roads a higher cost upon the traffic thereon, it is for it to say that it will insist upon it, and neither the high cost of the transportation nor

the diversion of the traffic, nor engagement in interstate commerce, can take away this fundamental right of the sovereign State which owns the highways. To engage in interstate commerce over the State highways, trucks must get on to the highways; and, to get on to them, must comply with the conditions imposed by the State for the safety of its citizens. If the trucks cannot operate over the highways of South Carolina at a profit, they can stop, whatever the misfortunes the stopping may produce.

In the *Erie Railroad* case, *supra,* at page 412, the Court said:

> "The board must be supposed to have known the locality, and to have had an advantage similar to that of a judge who sees and hears the witnesses. The courts of the state have confirmed its judgment."

Here the members of the legislature from all parts of the State were familiar with the conditions of the roads, the subsoil and other like elements entering into the construction. They were familiar with the ability of the State to raise money to build and to maintain the roads. They appointed a committee to investigate the situation and report to the legislature upon its findings, and after hearing it, passed the act. As the Court said in the *Erie* case, the legislature must be supposed to have known the locality and to have had an advantage similar to that of a judge who sees and hears the witnesses, and, as in that case, "the courts of the state have confirmed its judgment". In this case the Supreme Court of South Carolina has confirmed the judgment of the legislature in the *Nutt* case.

It seems clear that the Court below, in thus expressly finding and holding that the statute was reasonable under the Fourteenth Amendment, thereby itself eliminates any basis or ground for its finding that the statute was unreasonable under the Commerce Clause (Assignment of Error No. 22).

The court below, in its 25th Finding of Fact (R. 83) gives as a reason that there are only four other States in the Union having a weight limit of 20,000 pounds and that this is contrary to recommendations of certain societies.

In *Sproles* v. *Binford, supra,* page 390, the Court said:

> "In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens. In the instant case, there is no discrimination against interstate commerce and the regulations adopted by the State, assuming them to be otherwise valid, fall within the established principle that matters admitting of diversity of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act. *Minnesota Rate* Cases (*Simpson* v. *Shepard*), 230 U. S. 352, 399, 400; 57 Law Ed. 1511, 1541, 48 L. R. A. (N. S.) 1151; 33 S. Ct. 729; Ann. Cas. 1916A, 18. As this principle maintains essential local authority to meet local needs, *it follows that one State cannot establish standards which would derogate from the equal power of other States to make regulations of their own.*" (Italics ours.)

In *Werner Transportation Co. et al.* v. *Hughes,* decided by a Three-Judge statutory Court for the Eastern District of Illinois, June 18, 1937, advance sheets to 19 Fed. Supp. 425, the same question of the Illinois Act being a burden upon interstate commerce was raised, and in its opinion the Court said:

> "Plaintiffs say that the statute in question directly burdens interstate commerce because the maximum gross weights allowed by adjoining states are in excess of the maximum weight allowed by the statute in question. The real question here is not whether the

weight allowed by Illinois is less than those allowed by Minnesota and Wisconsin, but is, rather, whether the regulations imposed by Illinois bear some reasonable relation to the results sought to be accomplished."

In *Houston & North Texas Motor Freight Lines et al.* v. *Phares et al.*, decided by the District Court for the Northern District of Texas, reported in Advance Sheets to Federal Supplement, Vol. 19, p. 420, the Court sought to enjoin the enforcement of the Texas statute limiting the weight of load on commercial trucks to 7,000 pounds as being a burden upon interstate commerce. The Court held that the statute was reasonable and said:

"It is contended that other states allow a larger load. It is contended that certain roads, U. S. Highways 75 and 77 and others, will support a greater load."

The Court further said:

"One question that, in the court's mind, is determinative of the issues raised is that it is a proper exercise of the police power of a state to preserve uniformity and avoid congestion on its highway system. Take the testimony of the witness Gilchrist, the state highway engineer. When asked by the court what his idea would be as to an ideal traffic situation, he said, in substance: I think that a greater weight might be allowed upon the highways but I think it ought to be limited to a speed of twenty-five miles an hour, and the width should be limited to eighty-four inches. I am inclined to agree with witness Gilchrist. If I were the legislature or if this court is, as might appear from some of the argument, clothed with legislative power as it were, I think I might allow this increased weight and decrease the speed. But that is not the prerogative of this court. And in the basic conception of our government it was not, according to the belief of this court, intended ever to become a prerogative of the judicial branch. The very situation shows the

necessity of its being regulated by the legislative branch of the government because the legislative body could decrease the speed and increase the weight. The court could not do so. That is, the court does not feel that he should do so. To attempt to do so would not only constitute a court of equity a legislative branch, but it would make of it an administrative branch of the government."

In *State* v. *Wetzel,* 208 Wis. 603, 243 N. W. 768, the defendant was indicted for violation of a statute of Wisconsin limiting the over-all length of combinations of vehicles on highways, semi-trailers measuring from the rear thereof to the rear of the vehicle to which it is attached, to 33 feet. The defendant claimed that the statute was so unreasonable as to violate the due process clause of the State and Federal Constitutions, and as it may affect vehicles, used in interstate commerce, the commerce clause of the Federal Constitution. Referring to defendant's contention that the statute is an unreasonable burden upon interstate commerce and an unreasonable discrimination between owners of trucks upon the highways, the Court said:

"We regard this contention to be without merit for several reasons. It is of course elementary that the stipulation of facts in this case is not binding upon the court or conclusive as to the relation between the section under attack and public safety upon the highways. The legislative power to adopt such measures as in its judgment will promote public safety cannot be defeated by stipulation of the parties, even if one of the parties is the state. At most, this stipulation, as well as the testimony upon which it was based, is entitled to be considered for the purpose of assisting the court in a determination of the question whether the statute has any reasonable relation to safety. So considered, it falls short of its objective. It is based upon the opinions of experts that the section excludes from the highways a truck-trailer combination that is safer than the types

that are permitted. The difficulty with this sort of testimony is that the final and conclusive opinion on the subject must be that of the Legislature."

In referring to the opinion of experts, the Court said:

"'Assuming, however, the utility of this evidence for the purpose of informing the court, its ultimate effect is merely to demonstrate the likelihood that an error in judgment was committed by the Legislature. This is not enough to condemn the law."

The decree (R. 85) enjoins the State officials from enforcing the weight, width and tractor-semi-trailer combination provisions of the Act against the plaintiffs while engaged in interstate commerce on certain highways of the State of South Carolina, "or on such portions of other Federal aid highways as may be of standard concrete or concrete and asphalt construction," and provides that the injunction shall not extend to bridges on the highways mentioned which have not been constructed with sufficient strength to support the heavy trucks of road traffic or are too narrow to accommodate such traffic safely, provided the State Highway Department shall erect at each end of such bridges proper notices of sufficient size and character to give ample warning that the use of the bridge is forbidden to trucks exceeding the weight or width limit.

The Court has thus opened the way for the appellees' trucks to operate over the roads of South Carolina, regardless of whether the axles are 40 inches apart and regardless of what weight limit is upon the road or what load limit is upon the motor vehicle. The South Carolina Highway Department and the police officials of South Carolina are prohibited from taking any action whatsoever, no matter how high-handed these operators may act.

This decree is a violent usurpation of the powers of the Legislature.

Morris v. *Duby, supra.*

What has been said as to the trial Court's erroneous decision as to the invalidity of the weight limits largely applies to its decision holding invalid, under the commerce clause, the provision of the statute limiting width to 90 inches, and to the Court's affirmative action in permitting widths up to 96 inches. The appellees' contention, and the Court's decision, that the fact that South Carolina is the only State which now has a 90-inch width limitation renders the statute invalid, is squarely met by the decision of this Court in the case of *Sproles* v. *Binford, supra,* holding that it is for each State itself and not for the courts (or adversely interested transportation or highway associations) to determine what the regulation shall be, unless the limitation is so unreasonable as to be arbitrary and capricious. "Over one hundred miles of the concrete paving is only 16 feet wide" (R. 197). While the record does not show how far the bodies of these large trucks extend beyond the wheels, obviously two 96-inch, or 8-ft. wide, trucks could not safely pass at any speed over a 16-ft. highway (R. 197). *Most* of the concrete and standard pavements are 18 feet wide, but some are 20 feet wide (R. 177). The record does not show how much of the concrete and standard highway is 18 feet wide and how much is 20 feet wide. It certainly cannot be said as a matter of law that a 90-inch, or 7½ ft., width limitation on an 18-ft. concrete highway is so unreasonable as to be arbitrary. When two vehicles of this width are passing, 15 feet of the 18-ft. highway are covered by the vehicles if their outer sides are directly over the edge of the pavement. This would leave only a distance of 3 feet between heavy vehicles which may be passing at high speed. Depending on the accuracy of the driving, sometimes there would be less than this distance between the passing vehicles and sometimes more. A great majority of highway users are private automobilists, who are not doing business for hire on the public highways and are not paid to take special and unusual risks

in using them. The great majority of this class of highway users would not wish to pass a large truck or bus traveling at permitted high speeds any closer than this. If there is any reasonable difference of opinion as to whether a passing distance of 3 feet or between 2 and 3 feet is too much or too little, under the decisions of this Court and all of the other decisions herein cited, the determination was for the South Carolina Legislature, and not for the Court below.

The State built, owns and has to maintain its roads. It spread its money all over the State so as to serve, as far as possible, all the people of the State. It did not have sufficient money to make all the roads of concrete, especially the through highways leading into other States. Granting the fact that some roads can withstand a weight limit of over 20,000 pounds, nevertheless, the Legislature was within its rights to fix a weight limit beyond which motor carriers cannot load. The same thing applies to the width.

The statute is one which encompasses moton vehicle regulation throughout the entire State. It does not provide different regulations for different roads or different parts of the State. It must stand or fall as a whole. It cannot be dissected. The Court held that the Motor Carrier Act of 1935 did not supersede the South Carolina Act or the power of the State to regulate the weight, length and widths of motor vehicles on its highways. It held that the act was within the police power of the State. In the passage of the act the legislature had an end in view which it desired to accomplish, to-wit, the preservation of the highways and the safety of travelers thereon, and as a means to that end it fixed the weight, length and width limitation. The Court held that these are reasonable, except as to the numbered highways mentioned in the decree. We submit that as the Motor Carrier Act of 1935 and the Federal aid have not superseded the police power of the State as to roads other than the numbered roads mentioned in the decree, they have

not superseded the power to regulate those numbered roads. The highways of South Carolina are owned by the State and maintained by it. The fact that Federal aid was granted in no manner impinges upon the ownership of the roads. The police power of the State cannot be surrendered. It cannot be divided. It is not within the province or the power of the Court below to pass upon and regulate matters, as here attempted, which this Court has held is beyond the power of even the Congress itself.

In *Morris* v. *Duby, supra,* it is said by the Court:

> "*Conserving limitation is something that must rest with the road supervising authorities of the state not only on the general constitutional distinction between national and state powers* but also for the additional reason having regard to the argument based on a contract that under the convention between the United States and the state in respect to these jointly aided roads, the maintenance after construction is primarily imposed on the state." (Italics supplied.)

Under Federal and State constitutions, the national and State governments consist of three bodies, each separate and independent of the other, neither having authority to usurp the powers or duties of the other, but in this case the Court below exerted all three. (1) It proceeded to act as a court, (2) by its decree it amended an act of the legislature of South Carolina as to use of the numbered highways, and (3) it acted in an administrative capacity in conditioning the use of state-owned bridges. The decree, by paragraph 2 thereof, in effect, permits the use, by trucks engaged in interstate commerce, of admittedly weak bridges unable to withstand a load of 20,000 pounds, unless and until the State Highway Department shall erect at each end of such bridges a warning notice that its use is forbidden to trucks exceeding the weight and width limit, and unless and until the proper authorities (meaning State authorities) shall

take the necessary steps to enforce the law against the use of such bridges by such trucks. Thus the Court, in paragraph 2, has laid down rules and regulations to be complied with by the Highway Department upon penalty of having its admittedly weak bridges destroyed by heavy truck traffic. The decree takes away from the Legislature of South Carolina all authority to regulate its bridges unless it complies with the conditions laid down in the decree. Not only does the Court do this, but it goes further and in paragraph 5 of the decree it retains jurisdiction of this cause for the purpose of making any such change or modification with respect to paragraphs 1 and 2 of the decree as may hereafter appear to be proper in the premises. By the fifth paragraph of the decree the Court reserves unto itself the right and power to make any further rules and regulations in respect to the use of the bridges and highways as in its judgment it deems proper. The decree fixes one rule for trucks engaged in interstate commerce and another rule for trucks engaged in intrastate commerce.

Proposition II.

The record evidence, read with facts judicially known, fails to sustain the findings of the District Court that the said weight and width limitations have no reasonable relation to the safety and protection of the State's highways and constitute an unreasonable burden on interstate commerce, and affords no proper basis for the action of the Court in imposing its own selective restrictions and permissions in disregard of the legislative judgment.

Under this Proposition appellants will rely on and argue their Assignments of Error numbered 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, and 16 (R. 88 to 93). The Findings of Fact mentioned are found in the record at pps. 76 to 84.

In discussing, under this Proposition, the sufficiency of the evidence to sustain certain findings of fact made by the Court below on fundamental matters involved in its decision, appellants wish to make it clear that they do not at all concede that it is within the proper judicial function of the Court below, or any other Court, to hold the South Carolina statutory limitations invalid upon findings made by weighing substantially conflicting evidence as to their reasonableness. In other words, the well settled rule of this Court that debatable questions of reasonableness are not for the Courts but for the Legislature, where the subject-matter falls within the police power of the State, cannot be avoided by the simple expedient of weighing the evidence and determining what regulations are, in the Court's opinion, reasonable or unreasonable. This is precisely what the Court below attempted in its findings and decision. If the well established and salutary rule above mentioned could be thus avoided, no statute enacted by a State under its police powers would be safe from successful attack and overthrow, since it is always possible to procure contrary and conflicting opinions and evidence on almost every subject of police regulation. Numerous examples would readily occur, such as health regulations, regulation of intoxicating liquor, of railroads, as to safety matters, and many other matters within the broad domain of the State's police power.

The fundamental error of the Court below, in appellants' opinion, lies in its failure to observe this well established rule as exemplified by the *Sproles* case, *supra,* and numerous other decisions hereinbefore cited, which rule is a necessary part of the foundation of the doctrine of the separation of judicial and legislative powers. In this view of the case, it would hardly be necessary to discuss the sufficiency of the evidence to sustain the Court's findings of unreasonableness in their varying aspects, because the

sharply conflicting evidence disclosed by the record presents no proper case for making judicial findings of fact contrary to the legislative determination; and this has been fully shown in the first sub-division of this brief. However, assuming for the purpose of the present discussion, that findings of fact were permissible, appellants are convinced that a number of the findings of the Court below are not sustained by the weight of the competent evidence in the Record, and in order to demonstrate the complete unsoundness in every aspect of the decision appealed from, appellants will discuss some of the more important of the Court's findings.

The general burden of proof which the law places upon every plaintiff was, of course, upon plaintiff herein to make proof of all the material facts relied on to overthrow the statute. The Court below does not seem to have fully recognized the requirements of this burden, and in particular instances seems to have assumed or implied that the burden was on appellants to prove facts to justify the statute; for example, in referring in its opinion (R. 67) to the sufficiency of highways in the cities to sustain heavy traffic, the Court says there is no showing that there has been substantial damage to any of the streets as a result of the heavy traffic passing over them for the past five years and no reasonable ground to apprehend such damage in the future, as if the burden were on defendants to show such damage in addition to proving (R. 169) that the paving in most of the city streets was only adequate for passenger traffic and was not sufficiently strong for heavy traffic. The burden resting upon the plaintiffs in a case like this is particularly heavy where the action of the Legislature (taken after mature deliberation and full investigation made at its direction) and of the highest court in the State upholding such statute, indicates that the evils

reached by it did exist. *O'Gorman & Young* v. *Hartford Fire Insurance Co., supra.* Under the decisions of this Court in such a case as this "the burden is on the attacking party to establish the invalidating facts." *Weaver* v. *Palmer Bros. Co.*, 270 U. S. 402, 410; *Simpson* v. *Shepard*, 230 U. S. 352, 452-453.

Of course, the invalidity of a statute enacted under the police power may be shown by things which will be judicially noticed, as well as by facts established by evidence (*Weaver* case, *supra*) and *per contra*, facts which the Court will judicially notice should and we think, must be considered where they uphold the validity of the statute. In this connection, we may note that a considerable part of the testimony for plaintiffs, and some of the conclusions of the court below, are palpably contrary to well known facts of which this Court and other courts have taken judicial notice, namely: that both the highway hazards and the wear and tear of the highways increase with the increase in the number and size of the vehicles, and the exclusion of the larger and heavier vehicles promotes both safety and economy. This is judiciously recognized by this Court in the case of *Morris* v. *Duby, supra,* quoting at pp. 143, 144, from *Buck* v. *Kuykendall,* 267 U. S. 307, 315. The same facts were judicially recognized by the Supreme Court of Illinois in *People* v. *Linde,* 341 Ill. 269; 173 N. E. 361, and the same principle of judicial recognition of the effect of heavy loads on highways is applied in *Polglaise* v. *Commonwealth,* 114 Va. 850; 76 S. E. 897, 901. Indeed, the same facts are judicially recognized by the Supreme Court of South Carolina itself in the *Nutt Company* case, *supra,* 180 S. C. 19, 27, 31; 185 S. E. 25, in passing on the constitutionality of this identical statute under the Commerce Clause. That court says that these judicially known facts are "no longer open to controversy."

The findings of the court below must, therefore, be tested, not only in the light of the general burden resting on all plaintiffs, but also in the light of the special burden resting upon a party seeking to overthrow a State statute enacted in the admitted exercise of its police power, and of the above mentioned facts, which the Courts judicially know, and which, therefore, cannot be controverted. Keeping these considerations in mind, we will now discuss the sufficiency of the evidence to support some of the more important findings of the court below.

(a) *Finding No. 20 as to the effect of tractor-semi-trailer combination.* This is Assignment of Error No. 6 (R. 89). All of the Findings of Fact are found on pages 76 to 84 of the Record, except the several findings made in the opinion (R. 55).

In its 20th Finding of Fact the court below found:

> "That the effect on the highways and bridges of the state of South Carolina of a tractor-semi-trailer combination is not different from the effect produced by two vehicles of equal weight, one following the other; and that the provision requiring that the tractor-semi-trailer combination be considered as one unit for the application of the weight limitation is unreasonable."

It is plain that the conclusion of the above Finding that the provision of the statute (Sec. 2) requiring that the tractor-semi-trailer combination be considered as one unit for the application of the weight limitation, is unreasonable, is wholly based on the court's conclusion of fact in this finding that the effect on the highways and bridges of the State of a tractor-semi-trailer combination "is not different from the effect produced by two vehicles of equal weight, one following the other". It is apparent that this finding is unsound and cannot be sustained, because, both

as a matter of common practice and common prudence, one vehicle cannot and does not follow another on the highway in close and immediate proximity, which is what this finding implies. Chief Engineer Williamson of the South Carolina State Highway Department specifically testified (R. 189): "Our normal procedure in designing bridges for loading is to have trailer trucks pass, one in each line of traffic, about 30 feet between them".

Further, there is no testimony that a tractor-semi-trailer type is twice as long as the ordinary vehicle, and our common knowledge is that it is not.

Not only would it be held negligence as a matter of law for one truck going at any speed to follow another within a distance of even 5, 10 or 15 feet, or even a greater distance, but such operation is prohibited by statute in most, if not in all of the States, and is, in fact, prohibited in South Carolina by Acts 1937, Act No. 175, 40 Statute at Large, p. 222, 227, Sec. 12, approved April 16, 1937, which provides that the driver of a motor vehicle shall not follow another vehicle more closely than is prudent, having due regard for speed and traffic and the condition of the highway, and as to trucks, this Section provides:

> "(b) The driver of any *motor truck or motor truck drawing another vehicle* when traveling upon a roadway outside of a business or residence district shall not follow within 150 feet of another motor truck or motor truck drawing another vehicle, and the driver of any motor truck traveling in convoy of two or more such motor trucks shall not follow within 500 feet of any other motor truck in the said convoy."

It is apparent, therefore, that this finding of the trial court is based on an assumption which is contrary to common practice, common prudence and to the statutes of South Carolina and nearly every other State, and hence the conclusion based thereon as to the unreasonableness

of the provision of Section 2 requiring the tractor-semi-trailer combination to be considered as one unit must fall for utter lack of support. Further, if the weight limitation itself is valid, this provision is necessarily reasonable in connection therewith and to prevent its avoidance.

(b) *Findings as to amount of weak highways and old weak bridges in System.*

The sufficiency of the evidence to support the findings on this subject embraced in the court's findings Nos. 18 and 19 (R. 81, 82), and the finding in its opinion (R. 73) that there is a "connected system of standard highways" of the finest character, is raised by appellants' 4th, 5th and 14th Assignments of Error (R. 88, 92).

We will first consider the District Court's Findings of Fact No. 18, which is that the standard paved roads (2,417 miles) "form a well-connected system of highways" which have been improved with Federal funds as a part of a national system, and it further specifically finds that these roads "are capable of carrying the commerce which has been developed by modern truck transportation; that Federal Highways Nos. 1, 15-A, 17, 21, 25, 29 and 52 comprise the great arteries of interstate commerce through the State of South Carolina, are of standard concrete paving as above described, *with the exception of a few short stretches, a few miles in length,* which are not of sufficient importance to justify the denial of these arteries of commerce for the purposes for which they were constructed".

Appellants submit that the evidence does not sustain these findings of fact, but even shows the contrary. The only witness who testified in any detail at all as to the construction of the South Carolina Highway System and as to the condition of the various roads and bridges, was witness Williamson, Chief Engineer of the South Carolina Highway Commission, whose testimony on this subject will be

hereafter referred to and who, as a matter of fact, is the only witness who had very much, if any, information on the condition and character of the construction of the highways. The only other witness who testified at all as to the specific condition of the South Carolina highways was Professor Harry Tucker, the Engineering Professor from North Carolina, who confessed that he did not know much about the South Carolina highways and only made a short trip into the State, apparently, for the purpose of attempting to qualify to give specific testimony and went, according to his testimony, "from Charlotte, N. C. to Spartanburg, Greenville, Anderson, Greenwood to Aiken, Batesburg, Charleston, Kingstree, Florence, Cheraw and on Route 52 to the North Carolina line". His testimony as to the strength of the highways related only to solid concrete roads. He does not state specifically what highways he traveled on, but, apparently, from his statement of cities visited, he traveled from Charlotte, N. C. on highway 29 through Spartanburg, Greenville and thence to Anderson, thence to Greenwood, either via Federal highway 178 or (Map R. 300) State highways 18 and 7 (R. 254); from Greenwood to Aiken he probably traveled on Federal highway 25 (Maps R. 300) and thence northerly to Batesburg on Federal highway No. 1. Logically he would take U. S. Highway No. 178 from Batesburg to Charleston, which highway, as seen from the map, Appellees' Exhibit 6 (R. 300), between Batesburg and Orangeburg is not part of the Federal-aid system; from Charleston through Kingstree, Florence and to Cheraw, near the North Carolina line, apparently, from his testimony, he took highway No. 52.

A map showing in heavy blue outline the route which Professor Tucker actually took will be found in the appendix of the brief of the original defendants, the appellants, South Carolina State Highway Department and others.

According to the scale, the figures as to distances given on the highway maps put in evidence by appellees indicate that Professor Tucker actually traveled *only 500 miles* in taking this trip over the South Carolina highways. This distance is approximately only one-fifth of the concrete or standard pavement mileage of the South Carolina highways and approximately only one-twelfth of the total mileage of the State highway system. These figures are illuminating as to the little knowledge of South Carolina highway conditions Professor Tucker must have had when he testified. Some of the highway over which Professor Tucker rode in his limited journey, particularly in the western part of the State, constitutes some of the best standard highway in the State, but in referring to the maps placed in evidence by appellees (R. 300) labelled "The Federal-aid highway system, progress map", showing eastern and western South Carolina and brought up to December 1, 1936, it will be noted from the pavement types shown on the map that a number of places even on these highways travelled by Professor Tucker are not cement concrete types represented by the letter "C" on the maps. The other type letters shown on these maps are "M" for surface treated macadam, "A" for roads having surfaces of bituminous material, irrespective of the bases; "B" for block and brick types, "E" for earth graded types, "G" for gravel types, and "S" for sand-clay types. While referring to these maps we call the Court's specific attention to the fact that on most of the principal highways of the State there are numerous types of highway of varying length other than the "C" or concrete type, and this alone tends strongly to negative the court's finding, above mentioned.

The mileage of the various types of surfacing are shown, by our measurements from this map (Appellees' Exhibit No. 6, R. 300), in the following table:

Route	Concrete surfacing	Bituminous surfacing	Macadam surfacing	Sand-clay surfacing	Earth surfacing	Not specific	Total
No. 1							
Miles	83.0	71.0	10.2	....	....	....	164.2
%	50.5	43.3	6.2	....	....	....	100.0
No. 15							
Miles	102.0	17.4	11.0	....	5.5	7.5	145.4
%	70.2	12.0	7.5	....	3.8	6.5	100.0
No. 17							
Miles	133.0	32.4	19.8	....	....	32.4	217.6
%	61.1	14.9	9.1	....	....	14.9	100.0
No. 21							
Miles	150.0	27.6	17.3	17.3	3.2	....	215.4
%	69.7	12.8	8.0	8.0	1.5	....	100.0
No. 25							
Miles	126.0	7.9	0.8	....	....	....	134.7
%	93.5	5.9	0.6	....	....	....	100.0
No. 29							
Miles	88.5	15.0	....	....	....	....	103.5
%	85.6	14.4	....	....	....	....	100.0
No. 52							
Miles	94.0	38.6	11.8	7.9	1.6	....	153.9
%	61.1	25.1	7.7	5.1	1.0	....	100.0
Total							
Miles	776.5	209.9	70.9	25.2	10.3	41.9	1,134.7
%	68.5	18.5	6.2	2.2	0.9	3.7	100.0

In the map legend, the surfaces of bituminous materials are not differentiated to show which are bituminous top on macadam, gravel, or other similar bases, and which are bituminous with a concrete base. Witness Williamson testified (R. 163), speaking of low type bituminous surfacing, that there were some sections of this type of pavement on practically every road in the State. Since the burden of proof is on Appellees, and since bituminous surfacing is not shown to have concrete bases, it cannot be assumed that any of the 209.9 miles, shown in the second column, is bituminous with a concrete base. The record shows that only 40% of the State system, considered as a whole, consists of concrete and bituminous concrete. Certainly from the foregoing it cannot be found that the State system, as a whole, constitutes a connected system of concrete roads.

The only witness to testify, who actually had a detailed knowledge of the condition and construction of the State Highway System was Chief Engineer Williamson. He testified (R. 160) that the subgrade conditions of concrete

pavement are a very big factor as to its strength and some concrete pavement in one section may hold up 100,000 pounds and the same pavement similarly constructed may break up under a two or three thousand pound load and these subgrade conditions occur "very often in short distances of one another on the same road". We may here state that there is very little evidence in the record, if any substantial evidence, on the subgrade conditions of the South Carolina highways; and since the burden was on plaintiff to prove all facts and conditions which would make the statutory weight limitations unreasonable, this Court may, and will assume, under its applicable decisions, that facts existed as to subgrade conditions which were within the knowledge of the Legislature and properly influenced it in imposing the weight limitations fixed by the statute. We will hereafter refer further to the importance of subgrade conditions. This witness, in response to questions by the court (R. 163, 166), testified to the existence of a number of weak bridges on certain highways mentioned by the court. (These highways mentioned by the court are actually Nos. 1, 52 and 25.) Witness further testified that there were about 50 miles of bridge-work on the highways and around 75% of this was not designed to carry a load in excess of ten tons (R. 174).

With specific reference to the numbered highways included in the Court's decree, this witness testified as to Route No. 1 (R. 163, 164, 192) that some of it was of weak construction, without stating definitely how much, and he further testified (R. 163), in answer to a question as to whether there were any other routes over the State over which there is some of this bituminous surfacing, or other weak type of road, "I think we have some sections like that on practically every road in the State. There is either a light bridge or piece of bituminous surfacing or

pavement, or surface treatment of some kind on practically every road we have got throughout the State." On Route 15 (R. 162) there are two sections of weak type of road, the length of which witness does not give, and there is one weak bridge on it (R. 164), referring to it as the road from Wilmington to Charleston by Florence. Route No. 21 is referred to in connection with the question of whether the bridges were weak or strong (R. 192), but there is no detailed evidence as to the character of this Route. Highway No. 25 is only casually mentioned. Highway No. 29 is discussed as a road from Augusta to Greenwood and Greenville, to Asheville, N. C. (R. 164, 165, 166, 192), but there is nothing definitely said as to the construction of this Route. Referring to the Route from Rosinville, Sumter and Bennettsville, which is Route 15 (Referred to as 15-A, in the Court's decree), witness says that this road probably carries more interstate traffic than any other continuous road through the State and it has a number of weak bridges, as well as weak sections of surface treated roads as described. Route 17 is discussed in connection with a number of weak bridges thereon (R. 192, 196) but there is no evidence as to the type of roads of which this Route consists, other than the map (R. 300) of the Federal-aid highway system, which indicates that an indefinite part of this Route is "M" type road, surfaced treated macadam, and "A", bituminous surface. Incidentally, the greater part of this Route 17 is not Federal-aid highway. He further testified that in recent years they had constructed considerable mileage of bituminous surfacing which was an earth type road with a cover and it could not carry heavy loads; that they had been constructing this type of roads since 1924 and on a large scale recently, having gone to that type of construction, rather than to concrete, because of lack of funds and the demands of the public to get them out of the mud and dust (R. 160, 161). This type of road is about

one-third of the mileage of the State, about 1700 miles (R. 161) and is found on practically every road throughout the State (R. 163). This is all of the testimony on the condition of the State highways and we respectfully submit that it by no means sustains the Court's Findings Nos. 18, and 19, or the Court's Finding in its opinion (R. 73) that we have here: "A connected system of standard highways of the finest character". The material evidence, both for appellees and appellants, clearly shows that there is no connected system of standard concrete highways, as found by the Court, and, further, wholly fails to show the important fact of the sub-grade conditions of practically any of the State's highways. In view of the slight detailed showing as to the character and condition of the various roads covered by the Court's decree, this almost total failure of plaintiffs to prove anything about the sub-grade conditions, would of itself overthrow the Court's findings and sustain the limitations imposed by the Legislature.

(c) *Findings that gross load limitation has no reasonable relationship to conservation and safety of highways, and that gross weight limitation of 20,000 pounds is unreasonable.*

We will here consider the District Court's findings of Fact Nos. 17, 21, 22, 23 and its finding in its opinion (R. 73) that there is no reasonable relation between the weight limitations in the Act and the preservation or safety of the highways, etc., embracing Appellants' Assignments of Error Nos. 3, 7, 8, 9 and 14.

In these findings the court below distinctly found as a fact, and as the principal basis of its decision, that there were no grounds for reasonable difference of opinion as to the gross weight limitation of 20,000 pounds not being necessary for the protection of the highways and that a gross load limitation had no reasonable relation to the safety of

the highways, and that the 20,000 pound limitation imposed by the statute was unreasonable for such purposes and further found that all of the highways covered by the decree were capable of sustaining without injury to the highway a wheel load of 8,000 to 9,000 pounds or an axle load of 16,000 to 18,000 pounds, according to whether the wheels are equipped with high pressure or low pressure pneumatic tires. Appellants earnestly submit that this finding of the unreasonableness of the weight limitation in question is not only shown to be unjustified by the weight of the evidence in the record, but is entirely negatived by the highest type of evidence of which this Court can take judicial notice.

The office of Federal Coordinator of Transportation was created by Act of Congress and Mr. Eastman, a member of the Interstate Commerce Commission, was appointed Federal Coordinator by the President and in the years 1933 and 1934, (about the time this South Carolina statute was enacted) had made an exhaustive investigation of various transportation matters, including the subject of whether there was need for Federal legislation to regulate other transportation agencies than railroads and to promote the coordination of all means of transportation. The exhaustive report of the Federal Coordinator was completed and transmitted to the Senate by the Chairman of the Interstate Commerce Commission on March 10, 1934, and is published as Senate Document No. 152. This report (Page 205) discusses State Laws And Regulations Concerning Equipment, and Operation of Motor Vehicles, and particularly their dimensions and weights under the State laws. On page 211 of this report it is said: "In most States the *gross weight of the vehicle and load* is the controlling factor. In others, restrictions apply to the net or 'pay' load.

There is no uniformity either in the maximum weights prescribed or in the method of their ascertainment." It further appears from Table VIII giving size and weight restrictions, found on page 206 of the report, that at least 12 States have a gross weight limitation of 20,000 pounds or under, and Louisiana and Texas have net weight limitations of 7,000 pounds for the vehicle, which would make a gross weight limitation of 20,000 pounds or under, and a number of States have gross weight limitations of slightly exceeding 20,000 pounds. With respect to the uniformity of weight limitations the report says (page 213): "State laws recently enacted do not indicate any trend toward uniformity of weight restrictions. The need of greater uniformity is generally conceded, *but the feeling is also quite general that the varying traffic, topographic, and financial conditions in the different States warrant some diversity of weight limitations.*" (Italics ours.)

It thus appears that what the court below finds to be non-existent and unreasonable, that is, the relation of a gross weight limit to highway preservation and the unreasonableness of a gross weight limitation of 20,000 pounds, is indisputably negatived by the opinion and the statutes of numerous State legislatures whose primary function it is to decide the questions involved.

The only witness who testified for plaintiffs as to the unreasonableness of the statute who had actually seen the South Carolina Highways, was, as heretofore mentioned, Professor Tucker, who had made a brief trip over about six of the South Carolina highways. He testified that the highways he traveled over showed no evidence of undue deterioration and were well constructed and drained and in his opinion, would bear a wheel load of from 8,000 to 8,500 pounds, or an axle load of from 16,000 to 18,000 pounds, (R. 125, 126) safely. He also testified that it was impos-

sible to say what caused a failure of a concrete pavement (R. 125). He further testified that the gross weight of a motor vehicle does not enter into the design of a concrete highway and has nothing to do with conserving the highway or with the cost of maintaining it, but that the only test was the wheel load.

Witness Teller, a highway engineer employed by the U. S. Bureau of Public Roads, testified also that the gross load is not a factor in the designing of concrete paving, but the critical factor was the wheel load (It may be here noted that there was similar testimony in the *Sproles* case, *supra*). He would not say that a gross load limitation had no connection with the protection of a road, but did testify that the 20,000 pound limit would likely limit the maximum wheel load to 8,000 pounds (R. 135). He had no knowledge of the design of the roads and bridges in this State (R. 134).

Witness Knowles, a designing engineer of a truck manufacturer, who had no knowledge of the South Carolina highways, stated that gross weight limitations did not protect the highways or promote safety (R. 119, 121). He thought that 40,000 pound trucks could operate as safely as 20,000 pound trucks (R. 122), but this Court knows judicially that this is not so.

Opposed to this meager and largely theoretical testimony, is the testimony of J. S. Williamson, Chief Engineer of the South Carolina State Highway Commission, (R. 158); Clifford Older (R. 231) and the evidence of C. H. Moorefield, Chief Engineer of the South Carolina State Highway Department for about 15 years (R. 255 to 271). Mr. Williamson was the only witness who testified who, by virtue of his position and experience, had any actual, detailed knowledge of the construction and condition of the highways. Mr. Older was referred to by appellees' witness, Mr. Tucker, as the originator of the "Bates" test for roads and as a "prominent" highway engineer, and he was

Chief Engineer of the Illinois Highway Department from 1917 to 1924 and supervised the building of over $100,000,000. worth of highways in that State. Practically all of the South Carolina highways up to 1925 were constructed under Mr. Moorefield's supervision and the statute here assailed was enacted by the Legislature in 1933, making the weight limitations to substantially conform to Mr. Moorefield's testimony before the Legislative Investigating Committee in 1931.

Mr. Williamson testified that the load that concrete highways can safely bear is very indefinite and that sub-grade conditions are a very large factor; that some concrete pavement may hold up 100,000 pounds and the same pavement in another section may break under a 2,000 or 3,000 pound load; and that these sub-grade conditions occur in the same territory and often within short distances of one another. He said that an axle weight of not exceeding 16,000 pounds can be recommended for standard concrete pavement, but even with that there was some concrete that would be too much for (R. 187) and a 16,000 pound axle load will do some damage and is bound to break down a concrete pavement earlier than a lighter load (R. 195). This witness, under a question from the Court, stated that standard concrete roads might carry 18,000 pounds axle load under good sub-grade conditions. He emphasized the sub-grade (R. 189) and stated that where heavy trucks, with an axle load of 16,000 to 18,000 pounds had been operating over roads without visible damage, that the damage is probably there, but had not shown up as yet (R. 182).

Mr. Older testified that he could not tell the strength of a concrete road by looking at it, because so many factors entered into it (R. 233) and similar concrete varies in strength and the strength of sub-grades and foundations

vary (R. 235); that deterioration in concrete roads produced by heavy vehicles might not show up for several years, depending on the weight (R. 234, 235); that the wheel load was the criterion for designing concrete roads, but that a gross load limit of 20,000 pounds has a relation to the preservation and protection of the highways (R. 236) and the weight and size of vehicles have a direct relation to safety (R. 240, 241) and expressed the opinion that the weight limit of 20,000 pounds in South Carolina was decidedly generous. He had seen the Illinois highways he had constructed fail under a 16,000 pound axle load, even after pneumatic tires were used (R. 249, 250, 238) and that is why he placed the maximum axle load for South Carolina pavements at 12,500 pounds.

Mr. Moorefield, former Chief Engineer, who constructed most of the South Carolina highways, testified before the investigating committee that the large and heavy trucks interfered to a marked extent with the free use of the highways (R. 258, 259) and his recommendation was that no vehicle with a load capacity of greater than five tons should be permitted on the highways.

It is apparent from its opinion that the Court below was greatly influenced to the fixed idea that there must be uniformity in all of the states by the recommendation of various unofficial bodies to the effect that concrete highways can safely bear wheel loads of 8,000 and 9,000 pounds and axle loads of from 16,000 to 18,000 pounds. These recommendations and opinions as to weight limits were made without regard to the specific conditions in the various states and are, of course, necessarily largely theoretical and speculative. *Standard Oil Co.* v. *Maryville*, 279 U. S. 582, 584, 586.

Passing at this time the question of the power of theorists to bind the several states as to legislative enactments within their province, this theoretical and speculative evidence is

wholly nullified by the indisputed facts that the concrete pavements in North Carolina and Illinois, which were scientifically built to stand these theoretical wheel and axle loads, are in actual practice being destroyed by them (R. 130, 238). The situation in Illinois, where axle weights of 16,000 pounds and gross weights of 40,000 pounds are lawful, was described by a Three Judge Court in the case of *Werner Transp. Co.* v. *Hughes*, 19 F. Supp. Advance Sheets, pp. 425, 429:

> "Even under the present legal weight limits, it was necessary for Illinois to spend the sum of $26,715,118.87 between the years 1925 and 1936 in the maintenance, reconstruction and surfacing of pavement slabs and shoulders upon the paved road system. • • •
>
> United States route No. 66, between Joliet and Granite City, is a heavily traveled truck route between Chicago and St. Louis. By actual traffic count, the ratio of truck travel on this route, compared with the general average for the state highway system, was 4.5 to 1 during the year 1932 and 4.2 to 1 during the year 1934. The cost of maintenance of route 66 between the years 1925 and 1936, has been the sum of $1,684,363.68, or an average of $763.53 per mile as against an average maintenance cost of $293.20 for the entire highway system of the state. There are highways in Lake County, Ill., which carry heavy truck travel between Chicago and Milwaukee and those that do not. *Both sets of highways are of similar thicknesses, are subject to the same climatic conditions and have the same type of subgrades and similar drainage. In the case of the pavements carrying but little truck travel, the pavements are enjoying comparatively normal lives with low maintenance cost. In the case of the pavements bearing excessive truck travel, they are rapidly disintegrating. Whenever a particular piece of pavement begins to carry heavy truck travel, immediately the life of the pavement begins to go down and the cost of maintenance begins to go up.*" (Italics ours.)

These theoretical recommendations made broadside for the whole country, as to what weights concrete pavements should be able to bear, and the various theories as to the wheel load or axle load being controlling, is also nullified by the actual experience of a large number of states, as reflected in their existing legislation at the time the South Carolina Act was passed, as pointed out in the Report of the Federal Coordinator of Transportation, referred to above.

Appellants earnestly submit, therefore, that on the evidence actually in the record and that which may be judicially noticed by this Court, the distinct weight of the evidence is against the findings of the court below on the questions herein discussed.

However, the reasonableness of a statute enacted under a State's police power may depend upon facts and conditions not shown by the evidence, which would justify the exercise of such powers, as well as upon the facts actually in evidence, and if any state of facts reasonably can be conceived which would sustain the statute, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by proper evidence, or facts judicially known, that the State's action is unreasonable or arbitrary. *Pacific States Box & Basket Co.* v. *White,* 296 U. S. 176, 185.

See also the *O'Gorman & Young* case, *supra,* 282 U. S. 251, at p. 258.

We think that the facts herein involved make this principle particularly applicable, and that a condition of facts may and should be found by this Court to have existed which would, of itself, constitute an absolute and independent justification of the gross load limitation imposed by the South Carolina legislature.

The facts and conditions we have in mind relate to the subgrade conditions of the State's highways and the great importance and material bearing such conditions have on the loads concrete highways will safely carry. All of the witnesses in this case are agreed that subgrade conditions are of great importance in constructing highways, with respect to the loads they will stand, and the testimony is that such conditions vary in the different States and even within short distances in different localities in the same State (R. 130, 160, 179, 234-235). There are so many factors entering into the question that it is almost impossible to say what causes the failure of a concrete pavement. While the burden of proving all of the invalidating facts was upon plaintiffs herein, the record, as we have heretofore pointed out, contains little, if any, definite evidence as to the various and varied subgrade conditions under the highways of the State. In view of this hiatus of material and important evidence, it will be proper to refer to information on the subject of which this Court can take judicial notice, which is contained in the magazine "Public Roads," published by the Bureau of Public Roads of the United States Department of Agriculture. Volume 10, No. 3, at page 37 of this magazine for May, 1929, contains an article entitled "Interrelationship of Load, Road and Subgrade" by C. A. Hogentogler, Senior Highway Engineer, and Charles Terzaghi, Research Consultant, of the United States Bureau of Public Roads. The following, from page 41 of this article, shows the importance of subgrade:

> " 'Breakage' due to load occurs on account of low subgrade support. This was clearly brought out in surveys by the highway research board and experiments performed at Arlington. According to the Arlington data summarized in Table 2, the ultimate resistance of slabs (7 feet square) to the occurrence of

breaking differs considerably depending upon whether they are laid on a drained or an undrained subgrade."

Table 2 gives the effect of the test and shows the difference in the breaking loads on a wet subgrade and a drained subgrade, showing that the breaking loads are very much lower on the wet subgrade. The several slab thicknesses, as well as the concrete mixtures used in the test are also given.

The complexity of the problem and great importance of subgrades is also shown by the following from page 45:

"Thus, according to the preceding discussions, pavement behavior may depend upon the character of the subgrade soil material (raw constituents), upon the structure of the soil in its natural state (dense or loose, homogeneous or full of cracks or root holes), upon the soil profile (variation in depth of the different soil zones and the relative occurrence of permeable and impermeable strata) upon adjacent topography (through its influence upon the occurrence of surface and underground water), upon climatic conditions (well distributed or intermittent occurrences of rainfall and presence or absence or frost action), or upon any combination of these variables."

A discussion of some of the subgrade soils of South Carolina is found at page 48, where it is said:

"Group A-5 Soils Characterized by Porosity, Deformation, and Rebound.

"Similar to those of Group A-4, these subgrades also consist primarily of very fine sands or silts. But in addition, they contain an appreciable percentage of micaceous particles or diatoms, which cause the subgrades of this group to be highly porous, to deform quickly under load and to rebound appreciably upon removal of load". * * *

"The highly micaceous soils occur very frequently in Pennsylvania, Maryland, and North and South Carolina and other States."

A further description of subsoils encountered in South Carolina is contained in Volume 17, No. 11, page 249, of the January, 1937, issue of "Public Roads" in an article by Paul Tritz, Associate Highway Engineer, United States Bureau of Public Roads, and H. L. Sligh, Division Engineer of the South Carolina State Highway Department, the article being entitled "Experimental Bituminous Treatment of Sandy Soil Roads". Referring to certain South Carolina soils, it is stated on page 249:

> "A wide variety of bituminous materials and aggregates have been used successfully for such work, and while different types or surfaces have resulted, there has been no special difficulty in providing a satisfactory surface for roads whose bases and subgrades were capable of supporting traffic.
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> "For those localities where the roads were composed of loosely bound soil, such as sand or mixtures of sand, silt, and clay that were inherently weak, the problem of improvement was more difficult. Such a condition is found in the South Atlantic coastal area in general, and the eastern part of South Carolina in particular.
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> "An appreciable mileage of the roads in this territory traverses relatively low, swampy areas that offer little opportunity for adequate drainage of the right-of-way because the ground-water level in many places is approximately at the elevation of the ground surface."

And on page 260, it is stated:

> "The most important factor contributing to roughness during most of the life of the road has been the subgrade, which is extremely variable in composition and, in some locations, is very poorly drained. Settlement occurred in some areas that had appeared stable prior to constructing the bituminous mats. Investigation disclosed that the subgrade in such areas was extremely wet and plastic while material less than a foot

outside of the bituminous mat was firm and relatively dry. The mat apparently prevented surface evaporation and permitted the subgrade to acquire and retain sufficient moisture to destroy its stability. Obviously, the composition could not be changed after construction but considerable effort has been expended to provide artificial drainage. The groundwater level in many cases is so high that the maximum benefit derived by the construction of the side ditches is to provide a relatively shallow depth of drained base which, because of its composition, is variable in load supporting capacity."

And on page 261, it is said:

"As in the case of experiment 1, subgrade and drainage conditions in this experimental section were exceedingly variable. Each section had sandy areas, areas high in clay content, poorly drained areas, and areas fairly well drained."

still referring to South Carolina conditions.

Poor subgrade conditions not only result in breaking of the pavement on the application of truck loads, but also cause a sinking of the subgrade underneath the pavement, permitting the pavement to subside. In order to obviate such results of pavements so weakened, or to strengthen the subgrade, an operation is sometimes performed called "mud jacking", which consists of boring a hole through the pavement and pumping suitable material through this hole under the pavement to spread and take the place of the subgrade material which has subsided. An explanation of this operation is given in Volume 14, No. 10, page 188, of the December, 1933, issue of the magazine "Public Roads", in an article entitled "Laboratory Tests Assist in the Selection of Materials Suitable for Use in Mud Jacking Operations", by A. M. Wintermyer, Assistant Highway Engineer, Division of Tests, United States Bureau of Public Roads.

The case of *Werner Transportation Co.* v. *Hughes* (D. C. N. D. Ill.), 19 Fed. Supp. Advance Sheets, p. 425, at pps. 428 and 429, refers to the results of poor subgrade conditions in Illinois and to instances of raising depressions there by this "mud jacking" operation in the following language:

> "Because of the presence of varied types of soil in Illinois, there is a variance in the supporting power of the subgrade during the seasons of the year. In the case of embankment materials, it is difficult to place them in a state of compaction which is uniform in its supporting power and will prevent settlement of the pavement slab. When the frost leaves the ground, many soils have little supporting power and many change greatly in volume with the addition of a relatively small amount of precipitation. During periods of freezing weather many soils expand greatly, due to the presence of water, and lift the pavement from the subgrade, introducing roughness into the surface, resulting in impact stresses under heavy loads, producing pavement destruction. Daily changes in temperature cause the pavement slab to warp, or curl, thus leaving that particular portion of the slab without subgrade support, so that when a vehicle passes across such a portion of a slab, the slab must act as a beam to carry the load back to the point where there is support.
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> . . . . . .
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> "Subgrade conditions are frequently unstable on fills back of bridge abutments and at other locations. Depressions in the subgrade are usually caused by the action of moisture upon unstable soil and a variety of other causes. Where a weakened subgrade condition exists the pavement slab performs to some extent the functions of a bridge, in which cases the total or gross weight imposed upon the slab determines the stress induced upon the material constituting the slab. If the stress produced by such total weight is in excess

of the ultimate strength of the material, rupture will occur and the slab will settle into the affected area. Because of the settlement of slabs, it is necessary to raise them by what is called a mud pumping outfit. Since the year 1931, there has been in Illinois a total of 12,050 depressions so raised, covering a total area of 1,082,775 square yards. However, in numerous locations where such settlements have occurred, the pavements have been so badly broken that they had to be entirely rebuilt."

The total number of depressions (12,050) raised in this manner since 1931 on the Illinois highways, is significant of the damage which may result from faulty subgrade conditions in connection with heavy loads.

The foregoing clearly indicates the relation of subgrade conditions to a gross load limitation. When a weakened subgrade condition exists, the pavement slab performs the functions of a bridge, as pointed out in the *Werner Transportation* case, *supra*. Where the subgrade is weak or defective, it is obvious that the supporting power of the pavement must be extended over a much greater area than under good subgrade conditions. The court below, in fact, seemed to recognize the propriety of a gross weight limitation in the case of highway bridges proper, since (R. 166) Parker, J., states in referring to bridges: "It seems to me the total weight of the truck is the important factor and the Legislature would have a right to consider that, as well as the strength of the pavement." However, he did not seem to realize that a gross weight limitation had the same relation to the pavement in cases where, through poor subgrade conditions, the pavement in fact tended to perform the functions of a bridge because of the subsidence of the subgrade. Possibly the court below failed to see this, because the plaintiffs, on whom the burden of proof rested, did not bring this commonly known fact to the Court's attention.

Another analogous factor, which is particularly important in a State known to have a warmer than average climate, such at South Carolina, is clearly set forth in an article in the magazine "Public Roads" published by the U. S. Bureau of Roads, in the November, 1935 issue, Vol. 16, No. 9, pages 169, 196. This article or report is written by witness Teller, who testified for appellees herein, and is entitled "Observed Effects of Variations in Temperature and Moisture on the size, shape and Stress Resistance of Concrete Pavement Slabs" and sets out extensive investigations by the Bureau of Public Roads under his supervision. On page 196 of this article, this writer says:

> "9. For pavement slabs of the size used in this investigation (10 ft. by 20 ft.) or larger, certain of the stresses arising from restrained temperature warping are *equal in importance* to those produced by the heaviest of legal wheel loads. The longitudinal tensile stress in the bottom of the pavement, caused by restrained temperature warping, frequently amounts to as much as 350 pounds per square inch at certain periods of the year and the corresponding stress in the transverse direction is approximately 125 pounds per square inch. *These stresses are additive to those produced by wheel loads.*" (Italics ours.)

In the December, 1935, issue of this magazine, Vol. 16, No. 10, page 201, the report on these studies is continued and, among other things, it is said on page 219:

> "It is apparent, however, that in pavement slabs as they are designed to-day the factor of safety against breaking must be very small at times when conditions are such as to produce high (temperature) warping stresses."

The underlying cause of the phenomena mentioned in the above quotation, is not peculiar to highway structures, but such warping stresses are present in the construction

of bridges, railroad tracks and other structures, and is a matter of common structural and scientific knowledge. It is apparent from this that a concrete pavement which is designed to carry an 8,000 pound wheel load under normal conditions will be stressed to the point of failure when such load is applied to the slab when it is in a condition of high warping stress produced by high temperatures, such as prevail in South Carolina the greater part of the year. This data given by witness Teller, must necessarily materially qualify and limit his general testimony in this case which did not mention such factors. The record, in fact, is wholly silent thereon.

Appellants submit that under the principles of *Pacific States Box & Basket Co.* v. *White, supra,* this Court may take notice of the existence and effect of the foregoing facts,[1] relating to subgrade conditions of highways and the stresses arising from temperature warping, and will indulge the presumption of the existence of such a state of facts as a full justification for the action of the South Carolina Legislature in fixing a gross weight limitation, and in fixing such limitation at 20,000 pounds. We may add that there is additional reason for applying the presumption of validity in this case, because as also noted in the *Pacific States Box & Basket Company* case, *supra,* this gross weight limitation was fixed by the Legislature after much prior statutory experimentation and after a thorough

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[1] Note: In connections with the consideration of such facts where the record is silent thereon, we also refer to the following decisions of this Court, where information not found in the record has been considered in this class of cases: *Muller* v. *Oregon,* 209 U. S. 412, footnote at p. 419; *Interstate Transit, Inc.,* v. *Lindsey,* 283 U. S. 183, footnote at p. 190; (the magazine "Public Roads" is cited); *Morehead* v. *New York,* 298 U. S. 587 at pps. 626-627; *Helvering* v. *Davis,* No. 910, decided May 24, 1937 (81 L. Ed. Advance Sheets, p. 804 at p. 809); *Carmichael* v. *Southern Coal & Coke Co.,* Nos. 724 and 797, decided May 24, 1937 (81 L. Ed. Advance Sheets, p. 811 at pps. 820-821).

investigation and hearing on the subject held by direction of the Legislature.

Furthermore, there is evidence in this record which, together with similar facts of which the Court may take judicial notice, clearly indicates that the 20,000 pound gross weight limitation imposed by the statute, when translated into wheel or axle load, would be substantially equivalent to the same maximum wheel or axle load which most of the witnesses thought the highways could safely bear. Appellees' evidence does not at any place in the record give the court below the benefit of a plain simple translation of wheel load into axle load and then into gross load, and for this reason, possibly, the court below wholly failed to understand that there is evidence in the record from which this may be done, with the result as above indicated.

The witness Teller testified (R. 135) in referring to the ratio of axle load to the gross load of two axle trucks, that the U. S. Bureau of Roads had weighed a good many of the trucks and that as a rule "there is from 65% to 80% of the load on the rear end", and that on the trucks they had used in their tests, there was about ⅓ of the weight on the front and about ⅔ of the weight on the rear end when loaded to capacity.

Similar facts appear from an article in the magazine "Public Roads", the Government publication above referred to, in the May, 1935, issue, Vol. 16, No. 3, in an article entitled "A Study of the Weights and Dimensions of Trucks". This article describes a study made jointly by the U. S. Bureau of Public Roads with certain Departments of the State of Maryland and the Johns Hopkins University, to determine, among other things, how the gross loads of such vehicles are commonly distributed to the various axles. The data thus obtained was by weighing trucks on two U. S. Highways out of Baltimore, Md. In discussing this study, it is said on page 42:

"* * * in the case of single vehicles, the weight carried on the rear axle averages approximately ¾ of the gross load. Vehicles having gross loads less than 10,000 pounds carried an average of only 68% on the rear axle. The gross weight of groups above 10,000 pounds all had an average of close to 75% for weight on the rear axle * * *. In the case of tractor-semi-trailer combinations, it may be seen that about 45% of the entire gross weight of the combination is carried on the rear ends of both tractor and trailer, leaving about 10% for the front axles of the tractor."

Taking witness Teller's figures of about ⅔ of the weight being on the rear axle, this would mean that under a gross weight limitation of 20,000 pounds, as prescribed by the statute, 13,333 pounds would be on the rear axle, with a wheel load limit of 6,666 pounds. Taking his figures of 80% of the weight being on the rear axle, this would mean, in the case of a 20,000 pound gross weight limitation, a 16,000 pound axle limit and an 8,000 pound wheel limit. Assuming that 75%, or three-fourths of the load is on the rear axle, this would mean a 15,000 pound axle limit, with a wheel limit of 7,500 pounds. Thus it will be seen that the opinion of witness Older (R. 237, 238) that a maximum axle limit on the best concrete pavement in the State should be 12,500 pounds, and that of witness Williamson (R. 187) that the axle limit should not exceed 13,500 pounds, is conservative and well within the 20,000 pound gross weight limit of the statute. The appellees and the court below only contended for an axle limit of 16,000 pounds on high pressure tires and 18,000 pounds on low pressure or balloon tires, but there is nothing in the record to show what percentage of the trucks, if any, operated on low pressure tires, so that if the 16,000 pound axle weight be taken as the maximum, this would be permissible under a 20,000 pound gross weight limitation, if 80% of the load were on

the rear axle. Eighty per cent. is witness Teller's maximum figure as to rear axle weights. From all of the foregoing testimony it appears that a 20,000 pound gross weight limitation will, under average conditions furnish a 15,000 pound axle limit, which would be liberal according to the testimony of most of the witnesses and would permit of almost as high an axle limit as the 16,000 pound limit insisted on by the court below.

It is true that the statutory gross weight limitation of 20,000 pounds would only afford a maximum rear axle limitation of 9,000 pounds for each of the two rear axles in case of tractor-semi-trailer combination, taking the figures as to the proportion of the load on the two rear axles given in the article in the publication "Public Roads" above referred to, which stated that as to such vehicles about 45% of the load was on each of the last two of the three axles. In 1933, when this statute was enacted, there were only 1764 trailers in South Carolina (R. 273) and presumably, this included semi-trailers.

However, in considering the question of the unreasonableness of this limit in the case of such combination vehicles, it must be remembered that the undisputed testimony of Williamson (R. 178) is that about 60% of the 2400 miles of concrete highway does not have center joints. He also testified that all of the pavement built since 1929, or 1930, has center joints, so that in 1933 when this statute was enacted, substantially more than 60% of the pavement must have been without center joints.

In view of this fact, the testimony of witness Older (R. 237) is significant. He testified at length as to the importance of center joints in concrete pavement and the effect of their absence, and expressed his judgment that the pavements of the State without center joints were not capable of supporting indefinitely "wheel loads in excess of about 4,000 pounds or 4,200 pounds". There is no

specific testimony in the record to contradict this, but only the general opinion of witness Tucker, who made a hurried trip through the State and had no detailed knowledge of the construction of the highways, the condition of the sub-grade, or other material matters.

We submit, therefore, that even in the case of combination vehicles, the District Court was in error in finding that there was no reasonable difference of opinion that a gross load limitation of 20,000 pounds was not necessary, and, as we have heretofore shown, the evidence in the record affirmatively shows that, as to ordinary two axle vehicles, this gross weight limitation will afford a maximum axle load greater than that recommended by a majority of the witnesses and substantially as much as that contended for by appellees and the court.

A further independent basis for a gross weight limitation may be found in the fact that such a limitation is easier of practical enforcement than a weight limitation based on wheel or axle load.

Witness Older, who in addition to having been Chief Highway Engineer of the State of Illinois for years, had also had experience as a law enforcement officer in Illinois (R. 244) testified that the gross load limit is easier of enforcement than an axle limit (R. 243). This Court has recognized in a number of cases that "The practical convenience" of a classification "is not to be disregarded in the interest of a purely theoretical or scientific uniformity". *Continental Baking Company* v. *Woodring*, 286 U. S. 352, 371.

In addition to the testimony of Mr. Older, we think there are obvious advantages in favor of the enforcement of a law prescribing a gross weight limit, as distinguished from a wheel or axle load limit. No special scales are required. It is not necessary for the enforcing officer to

have special training. After an officer is furnished with the weights of unloaded trucks, or after he acquires this knowledge from experience, the gross weight of a truck and load can be readily determined; in many instances to a reasonable degree of certainty without the aid of any scales. For example, some of the major commodities now handled by the trucks in and through South Carolina, as shown by the testimony of the appellees, consist of cotton, fertilizer and flour. In such cases, an officer could tell the amount of the load carried by merely looking at the load. The same is more or less true of lumber—another of the major commodities handled by truck—and probably other commodities. This Court will take judicial notice that the enforcement of such an Act is a very difficult undertaking.

The South Carolina Legislature realized that it would be difficult to enforce this Act. It provided in Section 12 that the duty of enforcement rested upon all peace officers, "* * * including sheriffs and their deputies, constables, police officers and marshals of cities or incorporated towns, county police or patrols, State or county license inspectors and their deputies, and special officers appointed by any agency of the State of South Carolina, for the enforcement of its laws relating to motor trucks, now existing or hereinafter enacted * * *."

If the services of all of these officers are to be available to the State in the enforcement of this Act, it is obviously imperative that a gross weight limit be prescribed.

We may here further point out that a gross weight limitation is much easier to comply with by the shippers and truck operators themselves. This is in part shown by the considerations above mentioned. Other reasons which seem apparent are that, if the limit is based on wheel or axle weight the load may shift after it is loaded; the wheels on opposite ends of an axle may not remain level after loading, so as to evenly divide the axle weight, and in the case

of liquid cargoes, such as gasoline, the load would not remain as loaded over the different wheels or axles in going up or down grade or on a sharply banked road.

Thus, from the important practical standpoint of both enforcement of, and compliance with, the statute, a gross weight limitation has greatly superior advantages over an axle load limitation based on the engineering formula, W equals 700 (L. plus 40), contended for by appellees and the District Court.

A further significant justification of a 20,000 pound gross weight limit imposed by the statute may be found in the tables showing the number of trucks registered in South Carolina from 1933 to 1936, Defendants' Exhibit No. 13 (R. 272). This shows a total truck registration in 1933, about the time the statute involved was enacted, of 17,795, and of all of these trucks 8,857 of them were of not over 1 ton capacity, and 8,252 of not over 2 tons capacity and 522 of not over 3 tons capacity. Undoubtedly, the gross weight of truck and load of all of these trucks would be less than the 20,000 pound limitation of the statute. In that year there were also 74 trucks registered with a capacity of between 3 and 4 tons, 4 trucks of 4 ton solid (tires), and 3 trucks of not more than 5 ton, and none over that capacity. Considering the average weight of the truck itself as distinguished from the load, it is entirely probable from common knowledge of truck weights, that all, or most, of these few remaining trucks of over 3 tons capacity could, if loaded to their rated capacity, be operated within the 20,000 pound limitation and few, if any, of them would be excluded. This table also shows that in 1936 a total of 30,497 trucks were registered, of which 14,243 were not over 1 ton capacity, 13,578 between 1 and 2 tons capacity and 2,306 between 2 and 3 tons capacity. Only 309 trucks registered were of 3 to 4 tons capacity and 19 trucks had a capacity of 4 to 5 tons and there were none over 5 tons.

Of all of these 30,497 trucks registered in this year, only 328, or about 1%, would by any probability, if loaded at the factory rating, and considering the usual weight of the truck chassis and body, exceed the South Carolina gross weight limit, and probably, considering the usual weight of the chassis and body of the 4 ton trucks, the 309 trucks mentioned would come within the limitation, leaving only 19 five ton trucks which might exceed it. Certainly, it cannot be claimed that the weight limit adopted in South Carolina is unreasonable, if it permits operation on its highways, of all of the trucks registered in the State, or all of such trucks, except a very minute fraction thereof. To hold otherwise, would be to hold that South Carolina was required to impose its weight limitations solely to accommodate trucks from other States—a remarkable proposition, which apparently did not meet the approval of this Court in the *Sproles* or *Duby* cases, *supra*.

As the major part of the vehicles operated by appellees are vehicles for hire, and a greater number of the larger type of vehicles operated in South Carolina and elsewhere are commonly known to be "Trucks For Hire", we will here give the number of trucks and other vehicles for hire used in the United States, as a whole, and also, in South Carolina, together with the capacity of the trucks, as taken from the "Census Of Business: 1935" conducted by the United States Department of Commerce and found in a publication of the Department of Commerce entitled "Motor Trucking For Hire". At page 103 of that publication, it appears that there were in the year 1935 in the United States 179,824 motor vehicles for hire. The trucks included in these vehicles were of the following capacities in tons:

7,170 up to ¾ tons capacity;
58,410 from ¾ tons to 1½ tons capacity;
51,459 from 1.6 tons to 4.9 tons capacity; and
9,679 of 5 tons capacity and over.

There were also 21,440 tractors, 23,594 semi-trailers and 8,080 trailers in the United States.

On page 107 of said publication the same information as to the number of vehicles for hire in use in South Carolina is given and shows that there was a total of 1,085 vehicles for hire, and of the trucks here included, there were 30 trucks up to ¾ of a ton capacity, 375 from ¾ ton to 1½ tons capacity, 153 of 1.6 to 4.9 tons capacity and 3 trucks of 5 tons capacity and over. There were also 237 tractors, 242 semi-trailers and 45 trailers. These figures show that the number of trucks and other vehicles used for hire in South Carolina is far under the national average by States, the total number of trucks alone used for hire in the United States being 126,710 and the total number of such trucks in South Carolina being 561, or less than one-half of one per cent of the number in use in the United States as a whole.

If space permitted, several other of the District Court's findings of fact on the question of reasonableness would justify comment. For example (Seventh Assignment of Error); there is no sufficient evidence in the record to prove that there was no substantial deterioration of the highways since 1930, as the result of excessively heavy traffic. Further, the Court's assumption (Assignments of Error 9 and 14) that smaller or lighter trucks used on the highway are overloaded is not permissible, since it assumes a violation of the law and such an assumption is not justifiable as a basis for findings of fact.

(d) *Finding of unreasonableness of 90 inch width limitation.*

This is Appellants' Assignments of Error Nos. 10 and 11. The Court's Findings of Fact Nos. 24 and 26 (R. 91, 83, 86.)

The Court's finding that a 90 inch width limit is unreasonable, is apparently based solely on the fact that it found that all other States permitted a width of 96" and that this is the standard width of trucks engaged in interstate commerce. The fact that South Carolina is the only State having a 90" width limitation would not make the statute unreasonable or invalid, as this Court specifically held in the case of *Sproles* v. *Binford* that "one state cannot establish standards which would derogate from the equal power of other states to make regulations of their own".

The court below not only held the 90" width limit invalid, but itself fixed a maximum width limit of 96". As heretofore pointed out, this action of the Court is, at the best, a remarkable and wholly unjustified attempt at legislation on its part.

With respect to the reasonableness of a 90" width limit, it appears that the highways of the State are mostly only 18 feet wide, although there are some 20 feet wide, and over 100 miles of paving only 16 feet wide, with a small stretch in Sumter County only 9 feet wide (R. 177, 197). No comment is necessary with respect to the 16 foot highway. The difference between a 90" and a 96" width is only half a foot. Two 90" width trucks passing on a 18 foot highway will take up 15 feet of the 18 feet width, leaving only 3 feet of additional space. Considering the factors of the necessity of a certain amount of space between trucks passing each other at a considerable speed, the effect of wide trucks in cutting off the view of vehicles in the rear, and the effect of wider trucks of an 18 foot highway in tending to cause the outer wheels of the vehicle to travel on the shoulders of the roads, causing excessive damage to them, or making ruts in the edges of pavements, it seems

clear that the Legislature was well within its discretion in fixing a 90" width limit. With respect to the effect of wide trucks on the view, the evidence shows that the angle of vision is cut off quite rapidly in proportion to the width (R. 241) and that "six inches difference (in width) would make a great difference" (R. 242). The bearing of the width of trucks on their effect on the shoulders of the highways, when passing other vehicles, is particularly pointed out in the case of *Werner Transportation Co.* v. *Hughes, supra,* 19 F. Supp., Advance Sheets, p. 430.

We submit, therefore, that the District Court's finding of unreasonableness as to width limit is little more than its arbitrary dicta or personal preference, and is wholly unjustified by any evidence herein.

Proposition III.

Neither the fact of Federal-aid contributions, under the Federal Highway Act, nor the enactment of the Motor Carrier Act, 1935, as construed by the court below considered separately or together, with the other circumstances relied on by the Court, sustain its finding that the State act violates the Commerce Clause.

Under this Proposition appellants will rely on and argue Assignments of Error numbered 11, 15, 17, 19, 20, 21 and 22 (R. 91, 92, 93 and 94).

The precise legal ground for the holding of the court below that the Act in question burdened interstate commerce in violation of the Federal Constitution cannot, we think, be definitely stated with certainty and, therefore, it is somewhat difficult to definitely and directly point out the errors in the Court's conclusions on this phase of the case. It is certain, however, from the Court's opinion and findings that it did give material weight, and in fact a very

preponderant weight, to the fact of Federal-aid contributions under the Federal Highway Act, as we will hereafter show. It, also, apparently gave weight in an indefinite and, we think, wholly illogical way, to the Federal Motor Carrier Act, 1935, although it definitely held in the same opinion that Congress, in enacting this Act, did not intend to enter the field of the regulation of weights and widths of motor vehicles, and hence, that that Act did not supersede the State statute with respect to weights and widths of vehicles. The error of the court below, speaking generally, consisted of its giving such effect to the Federal Highway Act, possibly in connection with the Motor Carrier Act, 1935, that it held that the State statute unreasonably burdened interstate commerce because its enforcement would prevent a large number of heavy interstate vehicles from using the Federal-aid highways notwithstanding, and in the face of, the fact that it held that the statute was a valid police regulation under the Fourteenth Amendment, and hence should have also held that any resulting burden on interstate commerce was incidental and indirect, and not such as would render the statute invalid.

In connection with its holding on the question of interstate commerce, the court below erroneously relied on certain decisions of this Court where the State regulation or action was a direct burden upon, and an obstruction to, interstate commerce and did not affect it merely incidentally as a result of a valid police regulation, and in which the subject and purpose of the State's statute or action was not admittedly for the preservation of the highways, but necessarily constituted a regulation of the interstate *business* of the carrier.

We shall undertake to show that the Federal Highway Act does not purport to affect the State's powers of regulating Federal-aid highways for the purpose of highway

protection and safety under statutes otherwise valid, and that the Motor Carrier Act, 1935, under the District Court's own construction thereof, can have no effect on the validity of the statute.

While the court below in its opinion seemingly conceded (R. 68) that the fact that the Federal Government had aided in the construction of highways does not detract from the power of the State to regulate and control them, the record demonstrates, we think, that the Court did give a very preponderant effect to Federal contributions used in the construction of the highways embraced within its decree. At the beginning of the final hearing, the Court, speaking through Parker, J., said (R. 98):

> "We think that this Court should have the benefit of testimony as to the allegations of the bill that the Act is an unreasonable burden upon interstate commerce, particularly in view of what the Supreme Court said in the Morris *versus* Duby case: 'Regulation as to the method of use, therefore, necessarily remains with the State and cannot be interfered with *unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its contributions to bettering the highway systems of the Union and to facilitating the carrying of the mails over them.*'" (Italics supplied.)

In other words, the Court added, "we will pass upon the question as to whether the Act constitutes an unreasonable burden upon interstate commerce". From the italicized language, however, it is apparent that the Court intended to pass on this question in the light of the Federal contributions to the State Highway System.

The Court's decree (R. 85) bears this out and clearly indicates that the decree only embraced Federal-aid highways, although the record shows that there are other standard concrete or hard-surfaced highways in the State which

are not Federal-aid highways and, therefore, were not embraced within the terms of the decree. The decree, after enumerating seven principal highways to which it applied, also, held the statute invalid as to "such portions of *other Federal-aid highways* as may be of standard concrete or concrete and asphalt construction". As we have stated, there are other highways of this kind and character in the State which are not Federal-aid highways and are not among those specifically numbered and enumerated in the decree. The record shows the type of highway mileage improved with Federal funds (R. 253), and indicates that 193.5 miles were improved with bituminous concrete and 795.8 miles were improved with Portland cement concrete, making a total of 989.3 miles, or approximately 1,000 miles of standard hard-surfaced highway in South Carolina improved with Federal funds. The testimony of the Chief Engineer of the State Highway Commission (R. 159, 160) was that, as of June 30th, 1936, the mileage of standard pavement in the State was 2,417 and that approximately 75% or 80% of this, or from 1,800 to 2,000 miles, was concrete paving, which included asphalt paving with a concrete base. This would leave from 800 to 1,000 miles of standard concrete or asphalt paving with a concrete base which was not improved with Federal funds and is not, therefore, Federal-aid highway which, presumably, was not covered by the injunction decree. A glance at the map (R. 254) showing Federal-aid highways outlined in red, verifies this and shows that there are a number of standard "hard-surfaced" highways leading directly into other States which are not Federal-aid highways. See, for example, State highway 14 entering Pickens, S. C., from North Carolina and Federal highway No. 221 entering Spartanburg from North Carolina, as well as a number of others.

In thus treating the fact of Federal highway aid as apparently a material and controlling factor, the Court misconstrued the purpose and meaning of the Federal Highway Act and its conclusion is contrary to the decisions of this Court in the cases of *Morris* v. *Duby* and *Sproles* v. *Binford, supra.*

When construed by the applicable rules of this Court, it is clear that it was not the purpose of the Federal Highway Act to supersede, limit or affect the theretofore existing powers of the States to enact reasonable police regulations for the preservation and protection of their highways, though aided by Federal grants under this Act. The general rule of statutory construction applicable to these cases is well stated in *Reid* v. *Colorado,* 187 U. S. 137, at page 148, where it is said:

> "It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.'" Sinnott *v.* Davenport, 22 How. 227, 243, 16 L. Ed. 243, 247.

See to the same general effect *Savage* v. *Jones,* 225 U. S. 501, 532; *Missouri Pacific R. Co.* v. *Larabee Flour Mills Co.,* 211 U. S. 612, 623; *Vandalia R. Co.* v. *Public Service Commission,* 242 U. S. 255, 258; *Atlantic Coast Line R. Co.* v. *Georgia,* 234 U. S. 280, 292.

The Act of Congress known as the "Federal Aid Act" (Act July 11, 1916, c. 241) was entitled "An Act to provide that the United States shall aid the states in the construction

of rural post roads, and for other purposes". This original Federal-aid act was amended by the Federal Highway Act of November 9, 1921, c. 119 and is U. S. Code Title 23, Secs. 1 to 25, inclnsive. Nowhere in the original Federal Aid Act or in the amending Federal Highway Act, as it now stands, is there any suggestion that the Congress had any intention of affecting or superseding the well recognized existing powers of the several states to enact police regulations as to weights or widths of vehicles, or otherwise, for the preservation and protection of their highways.

Section 19 of this Act (U. S. Code Title 23, Sec. 19) is significant as to the intention of Congress. It reads:

> "The Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this chapter, including such recommendations *to the Congress* and *the State highway departments* as he may deem necessary for *preserving and protecting the highways and insuring the safety of traffic thereon.*" (Italics supplied.)

It cannot be denied that the South Carolina statute here assailed, regulating the weights and widths of motor vehicles, was enacted for the purpose of "preserving and protecting the highways and insuring the safety of traffic thereon".

Section 19 of the Act, above quoted, specifically requires the Secretary of Agriculture to make his recommendations for this very purpose to "the Congress and the State highway departments". This is, obviously, for the reason that the Congress, in enacting this statute, intended and understood that it was a function of the States and their Highway Departments to make such regulations for preserving and protecting the highways and insuring the safety of traffic thereon, unless Congress, in its regulation of interstate transportation on the highways should later undertake to do so. The Court below held that Congress had not

legislated on the weights and widths of vehicles in the Motor Carrier Act, 1935. Further, Sections 48 and 15 of the Federal Highway Act expressly make it the duty of the States or their subdivisions to maintain such highways "according to the laws of the several states", and permit the Secretary of Agriculture to have proper maintenance work done if the States should fail to do so.

It could not reasonably be thought that Congress would have had the purpose of withdrawing from the States their long existing powers of highway regulation in enacting this legislation, in view of the fact that the financial interest of the Federal Government by reason of such appropriations in the highways of South Carolina, as well as most of the other States, is comparatively slight, compared with the interest of the State. Under the provisions of the Federal Highway Act (U. S. Code Title 23, Sec. 6) the mileage of State highways designated to receive Federal aid shall not exceed 7 per centum of the total highway mileage, and the primary or interstate highways of a State receiving Federal highway aid shall not exceed more than three-sevenths of the State mileage eligible, or 3 per centum of the total highway mileage of the State. The total mileage in South Carolina is approximately 60,000 miles (R. 159), so that in South Carolina 4,200 miles would be eligible to receive Federal aid and a maximum of 1,800 miles would be eligible to receive such aid as primary or interstate roads, such as those embraced in the decree. Since the evidence shows (R. 253) that only about 1,000 miles of standard hard-surfaced highway in South Carolina has received Federal aid and only 1,800 miles would be eligible to receive aid as primary interstate highways, it is evident that the actual interest of the Federal Government, compared with that of the State is slight. Both under the statute and as a fact (R. 158), not more than 50% of the cost of any Federal aid highway may come

from Federal funds. The total cost of the South Carolina State Highway System is about $111,000,000 (R. 173) and Federal funds in the amount of $29,000,000 have been contributed. The main highway arteries in the State generally are not built with Federal funds according to the testimony (R. 191), but the main highways across the State have generally been so built.

In view of these facts and the provisions of the Federal Highway Act, above referred to, the reasoning in the case of *Carley & Hamilton* v. *Snook,* 281 U. S. 66, 74, seems applicable. In this case the statute of California, which required the payment of motor vehicle license fees for both resident and nonresident vehicles, was assailed on the ground that such fees were forbidden by Section 9 of the Federal Highway Act which required such highways to be "free from tolls of all kinds." In holding that the license fees were not "tolls" within the Act, this Court said:

> "Such fees were a common form of state license tax before the Federal Highway Act was adopted in 1921. That Act contemplated the continued maintenance by the states of state highways, constructed with Federal aid, the expense of which must necessarily be defrayed from revenues derived from state taxation. *It cannot be supposed that Congress intended to procure the abandonment by the states of this well-recognized type of taxation without more explicit language than that prohibiting tolls found in Section 9.*" (Italics ours.)

For even stronger reasons, it seems clear that Congress by enacting the Federal Highway Act did not intend that anything therein should invalidate or affect the well-recognized police power of the States to enact regulations as to the weights and widths of motor vehicles on the highways.

If the Act itself discloses that Congress did not intend to change the States' long recognized power and duty to

preserve and protect the highways, then it cannot properly be contended that the fact of Federal appropriations made under the Act may be considered to show any change in the State's relationship to its highways, affecting its power of preservation, or to show that regulations admittedly lawful before such Federal appropriations, would directly burden interstate commerce thereafter. Such a holding would involve utterly illogical legal inferences from the fact of Federal highway appropriations.

Furthermore, the decisions of this Court in the *Duby* case *supra,* and in the case of *Sproles* v. *Binford, supra,* following it, both considered such a contention and reached a contrary conclusion. In the *Duby* case, at pages 144-145, it is said:

> "Conserving limitation is something that must rest with the road supervising authorities of the state *not only on the general constitutional distinction between national and state powers,* but also for the additional reason having regard to the argument based on a contract that under the convention between the United States and the state in respect to these jointly aided roads, the maintenance after construction is primarily imposed on the state. Regulation as to the method of use therefore necessarily remains with the state and cannot be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them. There is no averment of the bill or any showing by affidavit making out such a case." (Italics ours.)

The same holding was made in the *Sproles* case, *supra,* There the court quoted from the *Duby* case and on page 389-390 of 286 U. S. said:

> "The objection to the prescribed limitation as repugnant to the commerce clause is also without merit.

> The Court, in Morris *v.* Duby, supra, (274 U. S. 143, 71 L. Ed. 971, 47 S. Ct. 548), answered a similar objection to the limitation of weight by the following statement, which is applicable here: 'An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' In the instant case, there is no discrimination against interstate commerce and the regulations adopted by the State, assuming them to be otherwise valid, fall within the established principle that in matters admitting of diversity of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act."

Thus both of these cases are absolutely against the holding of the Court below in this respect. The court below says (R. 273) that at first it was inclined to think that these decisions were conclusive of the case, but upon mature consideration, it does not think so, and adds that in neither of these cases was there any such showing of the unreasonableness of the limitation and "of the *direct* burden upon interstate commerce when applied to a system of standard concrete roads as is contained in the record before us." This quotation from the court's opinion gives some indication of the reasons which lead it to distinguish these cases from the instant case. It appears that the court thought that the burden on interstate commerce in this case was "direct", instead of merely incidental or indirect. In

this it was clearly in error. If, as the court also held in its opinion, the South Carolina statute was reasonable under the Fourteenth Amendment and as a general police regulation for the preservation of the State's highways, then under all of the decisions of this Court, the burden would be indirect and incidental. Furthermore, in the *Sproles* case, which held that there was no direct burden on interstate commerce, the evidence as to the actual burden on interstate commerce was as extensive as here, if it did not show a greater burden. The trial court there found that interstate trucks which had theretofore done business profitably could no longer do so under the 7,000 pound net limitation and it specifically found that many of such interstate trucks would have to unload their cargo at the State line and load same into smaller trucks, in order to do business at all in the State. Certainly, there is nothing in the present record which goes farther than this or shows a greater burden. We insist, therefore, that both the *Sproles* and *Duby* cases are directly applicable and demonstrate the error in the Court's findings and decree.

As heretofore pointed out, the court in its opinion (R. 98) seemed to attempt to base its position largely on the language in the *Duby* case, which held that the State regulation was valid "unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its contribution to bettering the highways systems of the Union and to facilitate the carrying of the mails over them". If this is the basis of the court's opinion, we submit that there is no evidence that the regulation is arbitrary and unreasonable in this case and have so shown in our discussion of the evidence under Proposition II. We have also shown under Proposition I that the evidence in the question of reasonableness is sharply conflicting and that the court below therefore invaded the province of the Legislature when it undertook to

determine the question of reasonableness, whether in the light of the Federal Highway Act or generally. For both of these reasons, as well as for the reason that the facts in the *Sproles* case were almost identical with those here involved, it is clear that this case does not fall within the above *dicta* in the *Duby* case, which was decided before the *Sproles* case.

This language in the *Duby* case was, of course, *dicta* because there was no averment in the bill or showing by affidavit making out such a case of arbitrary regulation defeating the purposes for which Federal aid appropriations were made. We further think that this language of the court there was properly intended to include only cases where the burden on interstate commerce was direct, and not merely incidental to an otherwise valid police regulation.

The court below also cited and quoted at considerable length from the decision of this Court in the case of *Nashville, etc., Ry. Co.* v. *Walters*, 294 U. S. 405, 417, where reference is made to contributions by the Federal Government in aid of State highways. We are somewhat at a loss to understand the exact purpose of the Court in referring to the *Walters* decision. It may be possible that in so doing, the Court had in mind what it had said in the earlier part of its opinion (R. 65), concerning the great development of interstate commerce by trucks within the past decade and the corresponding change and development of industry in the southeastern part of the country, and also had in mind a supposed analogy between these changed conditions in connection with Federal highway appropriations, and the changed conditions considered at length by the Court in the *Walters* case, in reaching the conclusion that the Tennessee grade crossing elimination statute was invalid under the Fourteenth Amendment (and not the Commerce Clause), because of changed conditions which had occurred

since a part of the cost was placed upon the railroad company by the statute when enacted. If this was the thought of the court below, there is no analogy and the *Walters* case is not at all applicable. As stated, that case was decided under the due process clause of the Fourteenth Amendment and not under the Commerce Clause. The Tennessee statute imposed on railroad companies one-half of the cost of the separation of grade crossings. The statute was enacted in 1921 and the suit was brought in 1931, and the railroad company assailed the constitutionality of the statute on the ground that it was unreasonable and arbitrary as applied to the particular crossing and under the particular circumstances, and relied largely on the recognized rule that a statute enacted under the police power may be valid when enacted, but may become invalid by subsequent change in the conditions to which it is applied. The part of the opinion of this Court in the *Walters* case, quoted by the court below (R. 68), purports to be the facts specifically found or of which the court could take judicial notice, and the part quoted shows the large contributions made by the Federal Government to the cost of the Federal-aid Highway System in Tennessee. A reading of the part of the opinion subsequent to the quotation made by the court below will clearly show that the purpose of this Court in referring to Federal-aid and, in fact, in its entire statement of the facts, including the footnotes to the opinion, was to indicate that since the enactment of the statute the interests of the railroads and the public with respect to grade crossing elimination had undergone a change, as had the principal purposes of grade crossing eliminations. In its conclusion from the facts summarized, this Court, (p. 421) said:

> "Federal-aid highways are designed so that motor vehicles may move thereon at a speed commonly much

> greater than that of railroad trains. The main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles. * * * The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation."

This Court further noted that the effect upon the railroads of constructing Federal-aid highways was to deplete existing rail traffic and revenues, and the separation of grades further intensified motor competition and depleted rail traffic. The Court held that in every case in the past where it had sustained the imposition upon railroads of a substantial part of the cost of separating grades, the new highway was an incident of the growth and development of the municipality in which it was located, but in view of the entire change of conditions and interests of the parties and the purpose at this time of eliminating grades, the Court held that the imposition of 50% of the cost of the particular grade crossing elimination was unreasonable and invalid.

The references by this Court in the *Walters* case to the importance of Federal-aid contributions, were made to indicate one of the reasons (and only one) why the purpose of grade crossing eliminations had changed; to show that, whereas formerly the hazards of railroad grade crossings resulted in large part from developments for the benefit of the railroads, thus imposing a resultant duty upon the railroads to pay a substantial part of the cost of their elimination, now the great interstate highways were constructed, in part, by Federal-aid, for entirely different purposes, and now the railroads instead of being the primary source of the hazards from grade crossings, were themselves greatly damaged and prejudiced in a variety of ways there pointed out, from the presence of grade crossings on highways, and

hence their duty in connection with their elimination had greatly lessened.

We cannot see the applicability of the reasoning above outlined upon the question of the invalidity of the gross weight limitation here involved. While there is no very definite evidence on the subject, aside from the motor vehicle registrations in South Carolina (R. 272, 273), conceding, for the sake of argument, that there has been great development in truck transportation in the Southeastern States in the past decade and a great addition to the number of large interstate trucks on the highways, still the *interest* of the State in preserving and protecting its highways has not ceased to exist, or even materially changed. Indeed, it would seem that its *interest* in and need to protect its highways had been augmented, because the added number of heavy trucks naturally increases the amount and extent of the damage to the highways; and particularly would the State's interest and duty to protect the highways be enlarged, because, as the court below expressly held, Congress has not legislated concerning the important subjects of weights and widths, and the State legislature is the only body with power to legislate thereon. Neither does the record show that in the last decade the contributions of the State to highway construction has largely or materially decreased, compared with those of the Federal Government. There is no definite evidence on this phase of the matter, even conceding it would be material.

We submit, therefore, that the quotation from the *Walters* case and the decision therein is wholly inapplicable to any question of law or state of facts arising in this case; and certainly the opinion of the court below does not point out its applicability.

The court below, also, seems to think that Congress by enacting the Motor Carrier Act, 1935, has, in some indefinite way affected or limited the State's power to enact

weight and width limitations, although it expressly held that Congress did not attempt to legislate on these subjects "but, on the contrary, expressly refrained from exercising" this power (Opinion, R. 57). The court below in this opinion says (R. 74):

> "Not only has Congress aided in the construction of the roads so that they become highways of such commerce, but in the enactment of the motor carriers' act, it has recognized truck traffic as a legitimate part of that commerce essential to the welfare of the public and subject to regulation for that reason. As said of Federal aid legislation in Bush Co. *v.* Maloy, 267 U. S. 317, 324, this legislation regulating motor carriers is of significance because it makes clear the purpose of Congress that state highways shall be open to commerce of that character."

Since Congress has admittedly expressly refrained from exercising its power to regulate the weight and width of vehicles, it is clear under all of the authorities that its failure or refusal to enter this field of regulation is as absolute in its effect as would have been its entry into this field of regulation. It did not "more or less" refrain from regulating weights and widths; it did so wholly and absolutely, and its refusal to enter into this field of regulation left the State's power therein wholly unimpaired. There must be an actual conflict to bring about any other result. See 12 *Corpus Juris,* Title "Commerce", page 18, Sec. 15; *Reid* v. *Colorado, supra; Missouri, Kansas & Texas Ry. Co.* v. *Haber,* 169 U. S. 613. The court below seems to think that the spirit of the legislation enacted by Congress to cover part of the field only, hovers over, so to speak, that part of the field Congress expressly left open to the States, so as to affect, in some undefined manner, the continued power of the States to act therein. This idea, we submit, is wholly metaphysical and is not supported either in reason or

authority. The case of *Bush & Sons Co.* v. *Maloy*, 267 U. S. 317, 324, referred to by the Court in this connection, involved a direct burden on interstate commerce, as we will hereafter point out.

The error of the court below in reaching its conclusion that the South Carolina statute violated the commerce clause resulted, in part, we think, from its assumption and holding that the South Carolina statute imposed a *direct* burden on interstate commerce and, in connection with this, from its misapplication of several decisions of this Court. The court below in three distinct places in its opinion (R. 71, 73 and top of page 74) states, in effect, that the enforcement of the South Carolina statute would place a "direct burden" on interstate commerce using the highways. It also cited approvingly in this connection the cases of *Buck* v. *Kuykendall* (R. 72), 267 U. S. 307, and *Bush & Sons Co.* v. *Maloy*, 267 U. S. 317 (R. 74). We think that neither of these cases is applicable here, because they both involve State regulations of the *business* of interstate highway carriers which constituted a *direct* burden on interstate commerce, and did not involve regulations for the protection and preservation of the highways, with a resulting *indirect* burden on interstate commerce.

The *Buck* case held invalid under the commerce clause a statute which, as construed and applied, prohibited the use of interstate highways by vehicles of common carriers for hire without first securing a certificate of convenience and necessity from the proper State official. The court said that it may be assumed that appropriate State regulations "adopted primarily to promote safety upon the highways and conservation in their use are not obnoxious to the commerce clause", where the indirect burden imposed is not unreasonable, but the court added (pages 315-316):

> "The provision here in question is of a different character. Its primary purpose is not regulation with

> a view to safety or to conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used * * *. Thus the provision of the Washington statute is a regulation, *not of the use of its own highways,* but of interstate commerce. Its effect upon such commerce is not merely to burden *but to obstruct it.* Such state action is forbidden by the commerce clause. It also defeats the purpose of Congress expressed in the legislation giving Federal aid for the construction of interstate highways." (Italics supplied.)

The distinction between the facts and holding in the *Maloy* case, as above indicated, and the present case is entirely clear. There, the regulation was upon interstate business and commerce itself, and not for the preservation of the state's highways, as here. The burden there was direct, while here any burden is necessarily indirect and incidental. It may be also suggested that the last sentence above quoted is unnecessary to the conclusion, because if the statute directly burdened interstate commerce, as it did, that is sufficient to invalidate it, regardless of Federal regulation. *Minnesota Rate Cases,* 230 U. S. 352, 396.

The same explanation is applicable to the case of *Bush & Sons* v. *Maloy, supra.* In that case, a common carrier of freight sought a permit to do an exclusively interstate business, but the permit was denied. It was admitted that the highways were not unduly congested and were constructed so that they could carry heavier burdens than would be imposed by plaintiff's trucks. In refusing the permit, the Commission had considered whether the existing lines of transportation would be benefited or prejudiced so as to affect the public interest and apparently denied the permit on that ground. Here the highways were not constructed or improved with Federal aid. This Court held that the state action directly violated the commerce clause. It held that

the question of Federal aid was not of significance in preventing the application of the rule in the *Buck* case. We quote the last paragraph of the opinion as explaining the *Buck* case and indicating that in both cases the state's action was held to be a direct burden on interstate commerce by regulating the doing of business by common carriers on interstate highways:

> "This case presents two features which were not present in Buck *v.* Kuykendall, No. 345, decided this day (267 U. S. 307, ante, 623, 38 A. L. R. 286, 45 S. Ct. Rep. 324). The first is that the highways here in question were not constructed or improved with Federal aid. This difference does not prevent the application of the rule declared in the Buck case. The Federal-aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that state highways shall be opened to interstate commerce. The second feature is that here the permit was refused by the commission, not in obedience to a mandatory provision of the state statute, but in the exercise, in a proper manner, of the broad discretion vested in it. This difference also is not of legal significance in this connection. The state action in the Buck case was held to be unconstitutional, *not* because the statute prescribed *an arbitrary test* for the granting of permits, or because the director of public works *had exercised the power conferred arbitrarily or unreasonably,* but because the statute, as construed and applied, *invaded a field reserved by the commerce clause* for Federal regulation." (Italics ours.)

Furthermore, in *Stephenson* v. *Binford,* 287 U. S. 251, 266-267, this Court stated that the *Buck* and *Maloy* cases dealt with state statutes affecting interstate commerce and "with discriminations relating thereto." In other words, the statute directly discriminated against interstate commerce.

In closing, we will briefly contrast the reasoning and holding in the above two cases with the holding in *Bradley* v. *Public Utilities Commission,* 289 U. S. 92. Here the Court upheld the action of State authorities in denying a certificate of convenience and necessity to operate as a common carrier in interstate commerce over a certain route because of the congested condition of the highway. We quote from the opinion of the Court (p. 95):

> "It is contended that an order denying to a common carrier by motor a certificate to engage in interstate transportation necessarily violates the Commerce Clause. The argument is that under the rule declared in Buck *v.* Kuykendall, 267 U. S. 307, 69 L. ed. 623, 45 S. Ct. 324, 38 A. L. R. 286, and George W. Bush & Sons Co. *v.* Maloy, 267 U. S. 317, 69 L. ed. 627, 45 S. Ct. 326, an interstate carrier is entitled to a certificate as of right; and that hence the reason for the commission's refusal and its purpose are immaterial. In those cases, safety was doubtless promoted when the certificate was denied, because intensification of traffic was thereby prevented. See Stephenson *v.* Binford, 287 U. S. 251, 269-272, ante, 288, 53 S. Ct. 181. *But there promotion of safety was merely an incident of the denial.* Its purpose was to prevent competition deemed undesirable. The test employed was the adequacy of existing transportation facilities; and since the transportation in question was interstate, denial of the certificate invaded the province of Congress. In the case at bar, *the purpose of the denial was to promote safety;* and the test employed was congestion of the highway. *The effect of the denial upon interstate commerce was merely an incident.*" (Italics ours.)

The foregoing is directly applicable to the instant case. There, as here, the purpose of the state action is to promote safety and to preserve the highways; and there, also, as here, the effect of the state action upon interstate commerce is merely an incident. The court below, therefore, was

clearly in error in declaring and holding that the South Carolina statute assailed constituted a *direct burden* on interstate commerce, and in holding that any incidental effect of the state's weight and width limitation on interstate commerce rendered the statute unreasonable and invalid.

Conclusion.

It is respectfully submitted that upon reasoning and the authorities set forth in this brief the decree of the court below should be vacated, and the suit ordered dismissed.

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November 4, 1937.

APPENDIX I.

South Carolina Acts, 1933—Act No. 259, Page 340.

AN ACT to Regulate and Limit the Use of the Public Highways in the State by Motor Trucks, Semi-Trailer Motor Trucks, Semi-Trailers and Trailers; to Enlarge the Powers of the State Highway Department and Other Bodies Having Like Jurisdiction and Incorporated Cities and Towns in Respect Thereof; to Provide for the Enforcement of this Act and to Prescribe Penalties for the Violation Thereof and Exempting Certain of Such Motor Trucks, Semi-Trailer Motor Trucks, Semi-Trailers and Trailers From the Provisions Hereof, or Certain of Such Provisions, and to Repeal All Laws Inconsistent With This Act.

SECTION 1. *Public Policy.*—Be it enacted by the General Assembly of the State of South Carolina: It is hereby declared to be the public policy of this State that heavy motor trucks, alone or in combination with other trucks, increase the cost of highway construction and maintenance, interfere with and limit the use of the highways for normal traffic thereon, and endanger the safety and lives of the traveling public, and that the regulations embodied in this Act are necessary to achieve economy in highway costs, and to permit the highways to be used freely and safely by the traveling public.

SECTION 2. *Definitions.*—When Used in This Act: "Motor trucks" means any motor propelled vehicle designed or used for carrying freight or merchandise and not operated or driven on fixed rails or tracks; but it shall not include self-propelled trucks designed primarily for passenger transportation, though equipped with frames, racks or bodies having a load capacity not exceeding 1,500 pounds.

"Semi-Trailer Motor Trucks" means any motor-propelled truck, not operated or driven on fixed rails or tracks, designed to draw, and to support the front end of a semi-trailer. The tractor (or motor propelled truck), together with the semi-trailer shall be considered one unit, and

the words, "Semi-trailer motor truck" as used in this Act, shall mean and embrace such entire unit. Provided, That nothing contained herein shall alter or be construed to alter existing law in respect to the licensing of semi-trailer trucks, whereby the motor unit and the trailer unit are considered independent units and a license is issued to each separately.

"Semi-Trailer" means a vehicle designed to be attached to, and having its front end supported by, a motor truck or motor truck tractor, and intended for the carrying of freight or merchandise and with a load capacity of over 1,500 pounds, except farm wagons used as trailers.

"Trailer" means any vehicle designed to be drawn by a motor truck, but supported wholly upon its own wheels, and intended for the carriage of freight or merchandise.

"Persons" shall include individuals, partnerships, associations, trusts and corporations, and the receivers, assignees or agents of any of them.

"Highways" shall include any public road, street, avenue, alley or boulevard, bridge, viaduct or trestle and the approaches thereto, within the limits of the State of South Carolina.

"Department" shall mean the State Highway Department of South Carolina.

"Local Authorities' hall mean every county, municipal and local board or body having jurisdiction over, and responsibility for the maintenance of, any highway other than state highways.

SECTION 2a. *Operation on Highways.*—Any person operating a motor truck, semi-trailer or other motor truck combination on or along any State highway shall, at all times, operate such vehicle to right of the center of said highway, so that the entire vehicle, including its load, shall be, at all times to the right of the center of said highway, except while overtaking or passing other vehicles traveling in the same direction. Any person operating a motor truck, semi-trailer or other motor truck combination shall not overtake or pass a vehicle traveling in the same direction when the view of the over-taking vehicle is in any way obscured, or when the vehicle to be overtaken is approaching the crest of a hill or rounding a curve.

SECTION 3. *Trailers.*—No person shall use or operate any trailer, as defined by this Act, on any highway.

SECTION 4. *Weight.*—No person shall operate on any highway any motor truck or semi-trailer whose gross weight, including load, shall exceed 20,000 pounds.

SECTION 5. *Height.*—No person shall operate on any highway any motor truck or semi-trailer motor truck whose height, including any part of the body or load, shall exceed 12 feet 6 inches, but nothing herein contained shall be construed to require the public authorities to provide sufficient vertical clearances to permit the operations of trucks with a height of 12 feet 6 inches.

SECTION 6. *Width.*—No person shall operate on any highway any motor truck or semi-trailer motor truck whose total outside width, including any part of body or load, shall exceed 90 inches.

SECTION 7. *Length.*—No person shall operate on any highway any motor truck or semi-trailer truck, the overall length of which, including load, is in excess of 35 feet. This Section shall not apply to trucks or semi-trailer trucks engaged in the transportation of lumber and logs from the mill or forest to shipping points, or from forest to mill or consumer.

SECTION 8. *Reduced Load and Speed Limits.*—(a) The State Highway Department and local authorities may, upon proper showing, issue special permits, which shall apply to roads or highways under their separate jurisdiction and supervision, for the operation of trucks, the operation of which would otherwise be prohibited under the provisions of this Act, subject to the following conditions:

(1) Any permit under the authority of this Section shall be in writing, which shall at all times be carried in the vehicle operating under the authority thereof, and shall contain such other and further restrictions as deemed necessary in the discretion of the issuing authority.

(2) Permits issued under the authority of this Section by the State Highway Department shall include authority

for the operation of such through any municipality on or along the street generally used on such highway route.

(b) County road authorities and municipal road authorities, in respect to roads under their sole supervision, may prohibit or limit the use of such roads by reducing the limitations fixed by this Act, if, in their discretion, such additional restrictions are proper and necessary; Provided, however, That on any road or street upon which such limitations shall apply there shall be conveniently and conspicuously posted such further restrictions showing the permitted maximum limits (weight, length and height) permitted over such thoroughfares. Provided, further, That no limitations shall be established by any county, municipal or other local authorities pursuant to the provisions of this Section that would interfere with or interrupt traffic as authorized hereunder over State Highways, including officially established detours for such highways, including where such traffic passes over roads, streets or thoroughfares within the sole jurisdiction of such county, municipal or other local authorities, unless such limitations and further restrictions shall have first been approved by the State Highway Department.

SECTION 9. *Exemptions.*—(a) The provisions of this Act shall not apply to motor trucks, semi-trailer motor trucks or trailers, owned by any agency of, the United States, the State of South Carolina, or any county or city or incorporated town therein, nor the equipment used only in husbandry, such as harvesting machines, threshers, and binders constructed so that they can be moved or propelled on the public highways.

(b) The State Highway Department, County Highway authorities, and municipal authorities may each issue special permits applying respectively to State Highways, County Highways and streets of municipalities, for the transportation of such over-size, over-weight, or over-length commodities as cannot reasonably be dismantled, and for the operation of such over-weight or over-size trucks, whose gross weight, including load, height, width or length, may exceed the limits prescribed in this Act, as may reasonably

be necessary for the transportation of such commodities, but such permits shall be issued subject to the following conditions:

(1) Any permit issued by the State Highway Department, or county road authorities, for the operation of a truck failing to come within the limits established by this Act or other limits already fixed by law, shall be in writing and shall be limited to one trip of the truck authorized to be moved or operated, as well as to the roads which are to be traversed by the said truck. Any such permit shall contain such further restrictions as in the discretion of the issuing authorities may seem appropriate.

(3) (Apparently misnumbered) In the case of any truck operated under the terms of any permit contemplated by this section, whether the same be issued by the State Highway Department, county road authorities or by municipal authorities, the operator shall carry in the said truck the permit for such operation so that it may be available at any time for public inspection.

(4) The operation of any motor vehicle, semi-trailer, or trailer in violation of the terms of any such permit, shall constitute a violation of this Act.

(5) Provided, That any permit issued by the State Highway Department shall give the holder thereof the right of passage over any part of the State Highway System, and all officially established detours thereof, including streets, roads and thoroughfares within the limits of any county, municipality or other local authority that are customarily used as a part of the State Highway System.

(c) The provisions of this Act shall not apply, prior to December 31, 1934, to any motor truck, semi-trailer, or trailer, which has been registered and on which has been paid the annual registration fee as provided, by the law of this State, before the date upon which this Act shall become effective, but shall, as to such trucks, be and become in full force and effect on and after December 31, 1934.

(d) The provisions of this Act shall not apply to telephone, telegraph or electric power companies, hauling by

means of their own vehicles, their own materials and equipment for construction or maintenance of their own property.

SECTION 10. *Penalties.*—The operation of any motor truck, semi-trailer motor truck or trailer, in violation of any section of this Act, or of the terms of any special permit issued hereunder shall constitute a misdemeanor, and the owner thereof, if such violation was with his knowledge or consent and the operator thereof shall on conviction be fined not more than Fifty ($50.00) Dollars, or imprisoned for not more than thirty (30) days.

(This Section as printed in the official bound volume of the South Carolina Acts, 1933, is in part misprinted and the above language of the Section is taken from an official copy of the statute filed in the office of the Secretary of State.)

SECTION 11. *Enforcement.*—Any officer hereinafter in Section Twelve enumerated, having reason to believe that the height, length, width or weight of any motor truck, semi-trailer motor truck or trailer, is in excess of the maximum limits prescribed by this Act permitted by any special permit issued under the terms hereof, is authorized to measure or weigh the same, either by means of portable or stationary scales, in the event such scales are on the route of said vehicle. Said officer shall require the operator of said motor truck, semi-trailer motor truck or trailer, to unload immediately such portion of load as may be necessary to decrease the gross weight of such vehicle to the maximum gross weight permitted by this Act or by the terms of any special permit in the possession of such operator and issued under the provisions of Section 9 (b) hereof (which excess load, when unloaded, shall be at the sole risk of the owner). The refusal of any such operator to permit his motor truck, semi-trailer motor truck or trailer to be measured or weighed or to proceed to a stationary scale, or to unload the excess load, shall constitute a violation of this Act.

SECTION 12. *Enforcement—Officers—Powers and Duties—Rights of Accused.*—Any peace officers, including sheriffs and their deputies, constables, police officers and marshals

of cities or incorporated towns, county police or patrols, State or County license inspectors and their deputies, and special officers appointed by any agency of the State of South Carolina for the enforcement of its law relating to motor trucks, now existing or hereafter enacted, shall be authorized, and it is hereby made the duty of each of them to enforce the provisions of this Act and to make arrests for any violation or violations thereof, and for violations of any other law relating to motor trucks, without warrant if the offense be committed in his presence, and with warrant if he does not observe the commission of the offense. When in pursuit of any offender for any offense committed within his jurisdiction, any such officer may follow and effect an arrest beyond the limits of his jurisdiction. If the arrest be made without warrant, the accused may elect to be immediately taken before the nearest court having jurisdiction, whereupon it shall be the duty of the officer to so take him. If the accused elect not to be so taken, then it shall be the duty of the officer to require of the accused a cash bond in a sum of not less than $25.00 for which the officers shall give a receipt stating the time and place where and when the accused is required to appear; conditioned that the accused binds himself to appear in the nearest court having jurisdiction at the time fixed in the bond. In case the arrested person fails to appear on the day fixed, the bond shall be forfeited in the manner as is provided for the forfeiture of bonds in other cases.

SECTION 13. *Severability.*—If any provision of this Act is declared unconstitutional or void for any reason or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and the applicability of such provisions to other persons and circumstances shall not be affected thereby. It is the intention of the General Assembly that, if this Act cannot take effect in its entirety because of the judgment of any court of competent jurisdiction holding unconstitutional or void for any reason any provision or provisions thereof, the remaining provisions shall be given full force and effect as completely as though the provision or provisions held unconstitutional or void had not been included in this Act.

SECTION 14. *Repeal Provision.*—All laws, or clauses of laws, in conflict, or inconsistent, with the provisions of this Act, to the extent of such conflict or inconsistency are hereby repealed.

SECTION 15. This Act shall take effect upon its approval by the Governor.

Approved the 28th day of April, 1933.

APPENDIX II.

Acts S. C., 1931—Statutes at Large, No. 575.

AN ACT to Create a Commission for the Purpose of Investigating Motor Transportation in South Carolina; and to Report to the Next General Assembly.

SECTION 1. *Commission to Investigate Motor Transportation—When to Report.*—Be it enacted by the General Assembly of the State of South Carolina: That there is hereby created a Commission of five members for the purpose of thoroughly investigating the question of motor transportation of freight and/or passengers in South Carolina, which said Commission shall report its findings and recommendations to the next session of the General Assembly of South Carolina.

SECTION 2. *Members—Appointments.*—That said Commission shall consist of two members of the State Highway Commission, two members of the Railroad Commission of South Carolina, to be appointed by the Chairman of the Railroad Commission of South Carolina, and one member of the South Carolina Tax Commission, to be appointed by the Chairman of the South Carolina Tax Commission; that said Commission shall organize by selecting one of its members Chairman.

SECTION 3. *Authority of Commission.*—That said Commission is hereby clothed with full authority to subpœna

witnesses and administer oaths, and to require the production of any and all documents, books, and records of whatever kind and nature pertaining to the question of motor transportation and/or the costs of motor transportation and/or taxes upon motor transportation as compared with the costs and taxes of railroad carriers in South Carolina. That the report of said Commission to be made to the General Assembly of 1932, shall include full findings of fact, together with recommendations and suggested legislation, preferably in the form of bills.

SECTION 4. *Compensation of Members—Employ Clerical Help—Limit of Expenses.*—That the members of said Commission for their services shall be paid actual traveling expenses incurred in the discharge of their duties hereunder, which said sum shall be paid as now provided by law for members of the two respective Commissions. That said Commission is hereby authorized and empowered to employ such stenographic and auditing assistance as may be necessary for the proper discharge of the duties of said Commission, and that the expenses of the same shall be paid upon proper vouchers from funds collected by the Railroad Commission of South Carolina in administering the Motor Transportation Act: *but, Provided, however,* That the total expense of this investigation shall not exceed the sum of Five Thousand ($5,000.00) Dollars.

SECTION 5. All Acts or parts of Acts inconsistent herewith are hereby repealed.

SECTION 6. This Act shall take effect upon its approval by the Governor.

Approved the 27th day of June, 1931.

APPENDIX III.

Acts of South Carolina, 1920—Statutes at Large, Volume 31, pps. 1072, 1078.

ACT No. 602.

AN ACT to Create a State Highway Department, to Define Its Duties and Powers, to Provide Funds for Its Maintenance by the Licensing of Motor Vehicles Operated on the Highways of the State, to Raise Revenue for the Construction and Maintenance of a System of State Highways, and to Assent to the Provisions of an Act of Congress, Approved July 11, 1916, Entitled "An Act to Provide That the United States, Shall Aid the States in the Construction of Rural Post Roads and for Other Purposes," and All Acts Amendatory thereto.

SECTION 13. *License Fees After January 1, 1921—Limitations on Weight of Trucks—Penalty for Violation—Dealer's License—Transfer of License.*—On and after January 1st, 1921, every resident owner of a motor vehicle in the State of South Carolina shall pay to the State Highway Commission, in lieu of all other State, municipal or county licenses, an annual license as follows: For each automobile weighing not over two thousand pounds the sum of six ($6.00) Dollars, and for each additional five hundred pounds of weight, or fraction thereof, the additional sum of two ($2.00) dollars. The manufacturer's weight of automobiles shall be accepted as the weight for the purpose of registration hereunder. And for trucks the license fees shall be as follows: Trucks of a capacity not exceeding one ton, fifteen ($15.00) dollars. Trucks exceeding one ton and up to and including two tons, thirty ($30.00) dollars. Trucks exceeding two tons and up to and including three tons, sixty ($60.00) dollars. Trucks exceeding three tons and up to and including four tons, one hundred ($100.00) dollars. Trucks exceeding four tons and up to and including five tons, two hundred ($200.00) dollars. Trucks exceeding five tons and up to and including six tons, two hundred and fifty ($250.00) dollars. Trucks exceeding six tons and up to and including seven and over, three hundred and fifty

($350.00) dollars; Provided, That a reduction of twenty-five (25) per cent. on the license be allowed on all trucks using pneumatic tires on all the wheels. Lumber trucks, and other trucks with trailer attached, shall pay an annual license of $5.00 for each trailer so operated, and an additional sum of $2.00 for every thousand pounds or part thereof of ordinary loading capacity of such trailer: Provided, That no truck larger than a four ton truck shall be allowed to be used on any highway or public road of this state unless the person desiring to operate any such truck larger than a four ton truck shall first make a petition to the authorities in charge of the roads in any county where it is proposed to operate such truck, stating the road or roads proposed to be used, and such road authorities shall consent to the use of such truck on such roads, and such consent shall be approved by the State Highway Engineer, in which event such truck shall, upon payment of the license fee herein provided, be permitted to operate on the roads stated in the petition and none other; any violation of the provisions of this proviso shall be punished as herein provided in Section 15 of this Act. For each motor cycle, three ($3.00) dollars per annum. Every dealer in motor vehicles in this state, before operating any such motor vehicles upon the highways of this State for the purpose of demonstration and sale, shall pay to the State Highway Commission of this State, in lieu of all other State, municipal and county licenses, an annual license of twenty-five ($25.00) dollars for the first make of motor vehicles sold by such dealer, and an additional annual license fee of fifteen ($15.00) dollars for each other make of motor vehicle sold by such dealer. All licenses shall expire on the thirty-first day of December following the date of issue. Annual licenses shall hereafter be issued between the first day of January and the first day of February of each year. In the case of motor vehicles registering for the first time, the full annual fee shall be paid for licenses issued between January the first and March the thirty-first; three-fourths of the annual fee for licenses issued between April the first and June thirtieth; one-half of the annual fees for licenses issued between July first and September thirtieth; and one-fourth

of the annual fees for licenses issued between October first and December thirty-first. Any owner of a motor vehicle upon which the license fee for the then current year shall have been paid shall, upon the sale of said motor vehicle notify the State Highway Department of such sale, giving the name and address of the purchaser, and upon the payment of a transfer fee of fifty (50¢) cents the original license shall be transferred to the new owner. The State Highway Commission shall furnish the Clerk of Court of each County with a sufficient supply of application blanks for license for use of the people of the county.

APPENDIX IV.

Acts of South Carolina, 1924—Statutes at Large, Volume 33, Act. No. 721, Page 1182.

No. 721.

AN ACT to Regulate Traffic Upon the Highways of The State, and to Provide Penalty for Violation Thereof.

SECTION 1. *Limit of Weight and Load for Vehicles on Highways—Measurement.*—Be it enacted by the General Assembly of the State of South Carolina: That from and after the passage of this Act, it shall be unlawful to operate on any of the highways or public roads of this State whether such roads are in the State system or not, any vehicle of four wheels or less the gross weight of which, including its load, is more than twenty thousand pounds, or to operate any vehicle having a greater weight than fifteen thousand pounds on any one axle, or having a load of over six hundred pounds per inch width of wheel concentrated upon the road surface (said width in case of pneumatic tires to be measured between the flanges of the rim and in case of solid rubber tires to be the actual width of said tires.)

APPENDIX V.

Acts of South Carolina, 1930, Statutes at Large, Volume 36, Pages 1192-1193.

"No. 685.

"AN ACT to Limit the Weight, Size and Loads of Vehicles Operated on Public Highways of This State and to Provide Penalties for Violations.

"3. *Weight-Limit-Distribution—This Section Additional to Act No. 543, Acts of 1926—Hauling of Cotton.*—

"Except as authorized in Section four hereof, no vehicle, whether operated singly or in combination with other vehicles on the public roads of this State, shall exceed in gross weight twelve and one-half (12½) tons, and the gross weight on no axle of any vehicle or combination of vehicles, having more than two axles, shall exceed five (5) tons. Any vehicle having more than two axles shall be so designed and constructed as to assure a constant distribution of weight among the axles while such vehicles are in operation, regardless of irregularities in the road surface. No combination of vehicles operated as a unit on the public roads of the State shall have a gross weight exceeding twenty (20) tons: *Provided,* That this Section shall not serve to repeal any provisions of Act No. 543, Acts of 1926, but shall be construed as provided additional limitations: *Provided,* That the limitations as to width of loads as stated in this Section and in Section 2 of this Act, shall not be deemed to prohibit the hauling of bales of cotton in loads not exceeding the width of two bales lying or standing edge to edge, if the bales are touching each other at both ends. It shall be lawful to haul cotton on the public highways of the State where the width of the load does not exceed the width of two bales placed edge to edge, against each other."

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL.,

Appellants,

vs.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF OF THE STATE OF SOUTH CAROLINA AND ITS OFFICIALS, ORIGINAL DEFENDANTS, APPELLANTS.

JOHN M. DANIEL,
Attorney General of South Carolina;
J. IVEY HUMPHREY,
Assistant Attorney General of South Carolina;
M. J. HOUGH,
Assistant Attorney General of South Carolina;
EUGENE S. BLEASE,
STEVE C. GRIFFITH,
Attorneys for Original Defendants, Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL.,

Appellants,

vs.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF FOR APPELLANTS.

Opinion of the Lower Court.

The opinion of the specially constituted District Court of the United States for the Eastern District of South Carolina, filed January 20, 1937, is reported in 17 Fed. Supp., p. 803, and is found on page 55 of the record.

Jurisdictional Statement.

The statement as to jurisdiction required by Rule 12 of this Court, was filed on June 1, 1937, and probable jurisdiction was noted on October 11, 1937.

Statement of Case.*

This case is an appeal from the final decree of the specially constituted District Court of the United States for the Eastern District of South Carolina entered by that court on January 20, 1937 (R. 85). The decree permanently enjoins the enforcement of certain sections of a statute of South Carolina which limit the weight and width of motor trucks which may be used on its highways in interstate commerce. The injunction is limited to the plaintiffs below, while they are engaged in interstate commerce on certain designated highways only and such other Federal aid highways as may be of standard concrete, or asphalt and concrete construction (R. 85).

Statute Involved.

The statute of South Carolina the validity of which is involved herein is Act No. 259, approved April 28, 1933, entitled in part, "An Act to Regulate and Limit the Use of the Public Highways in the State by Motor Trucks, Semi-Trailer Motor Trucks, Semi-Trailers and Trailers; * * *" and is found in Vol. 38, St. at Large, p. 340 (Appendix I).

The pertinent provisions of the statute are:

Sec. 1 declares the public policy of the State as to the effect of heavy motor trucks on the construction, maintenance and safety of use of the highways.

NOTE.—For the convenience of the Court, counsel for the original and intervening defendants, appellants, have incorporated in their separate briefs identical statements of the case, legislative and judicial history, and summary of the evidence.

Sec. 4 provides that "No person shall operate on any highway any motor truck or semi-trailer truck whose gross weight, including load, shall exceed 20,000 pounds;" which should be read in connection with the definition in Sec. 2 reading: " 'Semi-Trailer Motor Trucks' means any motor-propelled truck not operated or driven on fixed rails or tracks, designed to draw, and to support the front end of a semi-trailer. The tractor (or motor-propelled truck), together with the semi-trailer shall be considered one unit, and the words, 'Semi-trailer motor truck' as used in this Act, shall mean and embrace such entire unit * * *'."

Sec. 6 provides that "No person shall operate on any highway any motor truck or semi-trailer motor truck whose total outside width, including any part of body or load, shall exceed 90 inches".

Sec. 7 of the contested Act, relating to the permissible lengths of vehicles was slightly amended by Act No. 746, approved March 10, 1934 (38 St. at Large 1311), adding certain kinds of transportation to the exemptions of the Section, but such amendment is not material in this case.

While the bill of complaint (R. 2, 19) attacked the validity of Sec. 3 of the statute, which prohibits the operation of trailers, and Sec. 7, which imposes a length limit of 35 feet, the attack on these two Sections was abandoned during the suit, that is to say there was no evidence introduced by appellees to sustain their attack on these two sections and only Sec. 4, imposing a gross weight limit of 20,000 pounds, and the provision of Sec. 2, requiring a tractor semi-trailer combination to be considered as a single unit for determining weight, and Sec. 6, imposing width limit of 90 inches, were adjudged to be invalid.

Legislative History of Statute.

The Legislature of South Carolina first dealt with the weight and width limit of motor vehicles in 1920. Act No.

602, approved March 10, 1920 (31 Stats. at Large 1072), Appendix III, created the State Highway Department and Sec. 13 thereof, which dealt primarily with the licensing of motor vehicles, based on the manufacturer's weight, contemplated the licensing of trucks "up to and including seven and over (tons)" but "Provided, that no truck larger than a four-ton truck shall be allowed to be used on any highway or public road of this State, unless the person desiring to operate any such truck larger than a four-ton truck shall first make a petition to the authorities in charge of the roads in any county where it is proposed to operate such truck, stating the road or roads proposed to be used" and unless the road authorities consent to the use of such truck on such roads with the approval of the State Highway Engineer.

Act No. 721, approved March 26, 1924 (33 Stats. at Large 1182), Appendix IV, regulated traffic upon the highways of the State. Sec. 1 thereof made it unlawful to operate on any public road of the State, whether such roads are in the State system or not, "any vehicle of four wheels or less, the gross weight of which, including its load, is more than 20,000 pounds, or to operate any vehicle having a greater weight than 15,000 pounds on any one axle, or having a load of over 600 pounds per inch width of wheel concentrated upon the road surface".

Act No. 685, approved March 20, 1930 (36 Stats. at Large 1192), Appendix V, again changed the weight limits of motor vehicles and Sec. 3 thereof provided: "Except as authorized in Sec. 4 hereof, no vehicle, whether operated singly or in combination with other vehicles on the public roads of this State, shall exceed in gross weight twelve and one-half (12½) tons, and the gross weight on no axle of any vehicle or combination of vehicles, having more than two axles, shall exceed five (5) tons. Any vehicle having more than two axles shall be so designed and constructed as to

assure a constant distribution of weight among the axles while such vehicles are in operation, regardless of irregularities in the road surface. No combination of vehicles operated as a unit on the public roads of the State shall have a gross weight exceeding twenty (20) tons: * * *".

In 1931, there was enacted Act No. 575, approved June 27, 1931 (37 Stats. at Large 1086, Appendix II), which created a commission to investigate motor transportation in the State of South Carolina and required the report of the commission to be made to the 1932 Session of the General Assembly, and to include "full findings of fact, together with recommendations and suggested legislation, preferably in the form of Bills." This commission held exhaustive hearings, with full opportunity to interested parties to present their views. During such hearing, Dr. C. H. Moorefield, then Chief Engineer of the State Highway Department, and distinguished as a highway engineer and builder, appeared and testified. His statement was introduced in evidence in this case and incorporated a statement previously prepared by him as testimony on a similar investigation held by the State Railroad Commission (Exhibits 8, 9 and 10, R. 255-271).

The foregoing recital of legislative history of the statute indicates most clearly the previous experiments the Legislature had made in trying to arrive at a proper weight limit and the deliberate consideration given to the subject for two years preceding the enactment in 1933 of the limitations herein assailed.

The present width limit of 90 inches was imposed by Act No. 602, approved March 10, 1920 (31 Stats. at Large 1072), and has since been continued unchanged.

Judicial History of the Statute.

Before this suit was begun, the same provisions of the statute now assailed were upheld by the South Carolina

Supreme Court in a suit in which the same constitutional objections (including the attack under the Commerce Clause, but not including that based on the Federal Motor Carrier Act, 1935) were raised in the case of *State* v. *John P. Nutt Co.*, 180 S. C. 19; certiorari denied by this Court March 30, 1936, 297 U. S. 724. The opinion in that case, relying on numerous decisions of this Court, fully sustained the statute and also contains a detailed history of successful resistance to the enforcement of the Act by interests opposed to it, indicating a long continued thwarting of the legislative will by injunctive process. Notwithstanding the fact that the motor carriers who are parties plaintiff herein were not parties to any of the actions in the lower State courts mentioned in the opinion in the *John P. Nutt* case, it seems a clear inference from the allegations of the bill in this case that these parties successfully defied the enforcement of the South Carolina Act during this period and even continued to operate in violation thereof after the final determination of the validity of the statute by refusal of this Court to grant certiorari and until the granting of the temporary restraining order herein in November, 1936 (R. 37).

It may be further noted, in connection with the Judicial History of this Statute, that the District Judge herein, who had first heard the motion to dismiss in this case before the application for an interlocutory injunction and the convening of the Three Judge District Court, reached the same conclusion in upholding the statute, both under the Fourteenth Amendment and the Commerce Clause, as did the State Supreme Court (R. 24, 25).

Summary of Complaint.

The suit was commenced by a complaint filed on the 11th day of August, 1936, wherein seven parties, engaged in the transportation of property in interstate commerce, as common or contract carriers by motor truck, and four parties,

engaged in shipping produce or merchandise by motor truck in interstate commerce, joined as plaintiffs (R. 2-3). The prayer asked only a permanent injunction (R. 19).

The defendants (appellants) included the South Carolina State Highway Department and the South Carolina Public Service Commission, both administrative agencies of the State, their officers and employees, various other officers of the State, and police officers, all charged with the duty of enforcing the Act (R. 3-4).

Certain shippers and the Interstate Commerce Commission were permitted to intervene as parties plaintiff (R. 42, 50-54) and certain railroads were permitted to intervene as parties defendants (R. 43, 49, 54). The Interstate Commerce Commission asked to intervene only because of its interest in the enforcement of the Motor Carrier Act, 1935 (R. 43).

The complaint alleged that the weight and width limits of the Act were invalid on the grounds that:

(1) They violate the Fourteenth Amendment of the Constitution of the United States, in that they are unreasonable, arbitrary and capricious and have no real and substantial relation to the object sought to be obtained by the Act (paragraph 6 of complaint, R. 7).

(2) They violate Section 8, Article 1, of the Constitution of the United States, in that they constitute a direct and substantial burden on interstate commerce (paragraph 7 of complaint, R. 8).

(3) They are so arbitrary and unreasonable that they defeat the useful purposes for which Federal Aid (Secs. 1 to 56, Title 23, U. S. C.) has been granted, i. e., the bettering of the highway system of the United States and the promotion of the national defense (paragraph 8 of complaint, R. 8).

(4) The Motor Carrier Act, 1935 (Sec. 301 to 327, Title 49, U. S. C.), (a) has entirely superseded the South Carolina statute, and (b) renders the South Carolina statute a direct and substantial burden on and interference with interstate commerce, in violation of the Commerce Clause of the Federal Constitution, in that the enforcement of such statute subverts and defeats the declared purposes of said Motor Carrier Act (paragraph 9 of complaint, R. 8-11).

As a factual basis for the relief asked, the complaint further alleged (R. 8) that the essential service of interstate commerce cannot be performed by the several motor carriers with the use of motor equipment limited to a maximum weight of 20,000 pounds and the effect of such limitations in South Carolina would prevent interstate motor carriers from rendering adequate and efficient transportation service and (R. 15) will substantially increase the cost and time of transportation by plaintiffs and substantially increase the cost of transportation to the public and affect the price of goods moving in interstate commerce. There were further allegations that if the limitations of the statute were enforced, plaintiffs will be irreparably damaged and their business impaired or ruined (R. 12, 16, 17).

Rulings Below and Final Decree.

Before the convening of the Statutory Three Judge Court, the District Judge had granted Appellants' motion to dismiss complaint as to Paragraphs 4, 5, 6, 7 and 8 thereof, Paragraph 7 having alleged that the statute violated the Commerce Clause, but refused the motion as to Paragraph 9 of the complaint which related to the Motor Carrier Act, 1935 (Opinion and Orders, R. 22-32).

Appellants filed their answer putting in issue the material allegations of the complaint (R. 38) and appellees (plaintiffs) thereupon moved for interlocutory injunction pending final hearing (R. 32, 33). This was presented to a

single Judge who, after hearing, ordered temporary restraining order to issue to remain in effect until the application for interlocutory injunction could be decided by a three-judge court (R. 34-38). The District Judge convened the Three Judge Court pursuant to statute, before which all subsequent proceedings were had (R. 42). Appellants again moved to dismiss the complaint (R. 44) which motion, after argument, was overruled (R. 97).

The Court ruled that it would reconsider all of the questions heretofore determined by the District Judge and render decision on the complaint as filed (R. 97) and further ruled as to the scope of the hearing (R. 98): "In other words, we will pass upon the question as to whether the Act constitutes an unreasonable burden upon interstate commerce, and we are of the opinion that testimony should be addressed to that question and that question alone, and we see no reason why any great volume of testimony need be taken, or we see no reason why the taking of testimony should consume very much time."

It was thereupon agreed in open court that the hearing should be both final and interlocutory and a final decree should be rendered upon the hearing (R. 99). The Court found and held in its opinion on the final decree that the South Carolina statute did not violate the Due Process or Equal Protection clauses of the Fourteenth Amendment (Fourth conclusion of Law, R. 84) and held that these questions were sufficiently dealt with in the *Nutt Company* case, *supra* (R. 57); and further held that Congress had not assumed to control the size and weight of motor vehicles by the enactment of the Motor Carrier Act, 1935 (Third conclusion of law, R. 84, and opinion of the Court, R. 57).

The final Decree of the Court (R. 85) adjudged and decreed:

"(1) That the defendants, their agents and servants, be and they hereby are, restrained and enjoined from

enforcing against the plaintiffs while they are engaged in interstate commerce on the highways of the State of South Carolina numbered 1, 15-A, 17, 21, 25, 29, and 52, or on such portions of *other federal aid highways* as may be of standard concrete or concrete and asphalt construction, any provision of Act No. 259 of the General Assembly of South Carolina limiting the gross weight of trucks on highways to 20,000 pounds, or providing that a tractor semi-trailer combination shall be considered a single unit for the purpose of determining weight and thereby limiting the gross weight of such combination to 20,000 pounds, or limiting the width of (fol. 103) vehicles to 90 inches, if the vehicle does not exceed 96 inches in width.

"(2) That the provisions of this injunctive order shall not extend to bridges on the highways mentioned in the preceding paragraph where such bridges have not been constructed with sufficient strength to support the heavy trucks of modern traffic or are too narrow to accommodate such traffic safely, provided that the State Highway Department shall erect at each end of any such bridge a proper notice of sufficient size and character to give ample warning that the use of the bridge is forbidden by trucks exceeding the weight or width limit, and further provided that the proper authorities shall take the necessary steps to enforce the law against the use of such bridges by such trucks."

Paragraph (3) of the decree provided that the injunction was denied with respect to the other roads and bridges of the State, and by (5) jurisdiction was retained by the Court for the purpose of making any such changes as to paragraphs one or two of the decree as may hereafter appear to be proper.

It will be noted from Paragraph (1) of the decree, that while the complaint asked for an injunction generally against the enforcement of the Act as to interstate commerce, without referring to any particular numbered or

described highways of the State system, the Court below by its decree undertook to select certain specifically numbered Federal aid highways and "such portions of other Federal aid highways as may be of standard concrete or concrete and asphalt construction" as the subjects of its injunctive relief; and the second paragraph of its decree, excluding therefrom weak or narrow bridges, is conditioned on the performance of certain requirements imposed therein by the Court upon the South Carolina Highway Department.

Summary of Evidence.

Most of appellees' testimony was offered to show the effect of the enforcement of the State statutes upon interstate commerce. The appellants offered no testimony on that issue.

The eighteen witnesses offered by appellees on that question testified, in substance, that the weight and size of trucks used by carriers for hire are important in determining rates, and that the limits imposed by the South Carolina statute will greatly increase rates. They mentioned particularly a number of commodities, including fertilizer, household goods and furniture, lumber, flour, cotton, textile products, produce of truck farmers and vegetable growers, and stocks of chain stores. Witnesses for appellees testified that enforcement of the 20,000 pounds weight limitation will increase the cost of transportation of South Carolina produce to markets in other states, thus putting such produce at a disadvantage in competing with similar produce from states having a higher weight limitation and that the cost of operating the truck decreases per unit of commodity carried as the total pay load increases (R. 100-117; 142-158); that truck competition with railroads has tended to keep the level of rail rates down as to cotton shipped into the Port of Charleston (R. 107).

Vegetable growers in South Carolina ship to markets outside of the State by refrigerator trucks and most of such trucks are too large to comply with the South Carolina weight and width limitations; they are mostly owned in other States and used in all States; that rail service for less than carload lots is more expensive and slower than truck service and that the enforcement of the South Carolina law will put the South Carolina vegetable growers at a disadvantage with those of other States (R. 107-112; 152-153).

One of the plaintiffs, a carrier who operates in all of the forty-eight States, admitted that he was making money, and that in States like Texas, Tennessee and Alabama, in which he could not use his big trucks, he had special equipment complying with the State laws (R. 147). Another witness, employed in the Bureau of Motor Carriers, Interstate Commerce Commission, stated that trucks are still operated in the States of Texas, Kentucky and Tennessee (R. 142). Another of appellees' witnesses testified that the enforcement of the Act would cause large cargoes of freight now coming into the Port of Charleston to be diverted to other ports (R. 100-106; 204-205).

Many figures and much data from public records were offered, and testified to, showing the following uncontradicted facts. In South Carolina, there are approximately 60,000 miles of public roads, of which about 6,100 miles comprise the State Highway System. The roads in the State Highway System are classified as: "standard paving," of which there were (as of June 30, 1936) 2,417 miles; bituminous surfacing of which there were 1,724 miles; earth type roads, of which there were 1,141 miles; and unimproved roads, of which there were 666 miles. The classification of "standard paving", includes pavement that is wholly concrete, asphalt pavement on a concrete base, and

asphalt pavement on asphalt base (R. 159). The pavement wholly of concrete amounts to 1,800 to 2,000 (R. 160) miles. About 40 percent. of the concrete pavement has center joints (R. 178). Some of the pavements are 16 feet wide and some 20 feet wide, but most of them are 18 feet wide (R. 117).

The State Highway System has cost approximately One Hundred and Fifteen Million Dollars (R. 173-174), of which Twenty-nine Million, Seven Hundred and Forty-one Thousand Dollars was received from Federal aid (R. 137). Maps were used by both parties showing the particular roads upon which Federal aid was used (Exhibit 7, R. 254A; Exhibit 6, 300B, 300C). On Federal aid projects the cost was borne partly by the State and partly by the Federal Government, except some short sections which were built entirely by Federal funds (R. 158-159). No one road in the State is in its entirety a Federal aid project, that is to say, portions of the road were built by Federal aid, while other portions were built entirely by State funds (R. 191-192). Exhibit 4 (R. 253) shows the total mileage of completed Federal aid projects to be 2,798.7 miles; of this 795.8 miles are of concrete and 193.5 miles of bituminous concrete, the rest of this mileage being of low type roads. Exhibit 11 (R. 271-272) shows that there are 4,322 miles of road in South Carolina embraced within the approved Federal aid system.

Exhibit 14 (R. 273) gives the total registration of all motor vehicles in the State by years, from 1925 to 1936, and Exhibit 13 (R. 272) gives the trucks registered by rated capacity from 1933 to 1936. In 1936, there was a total motor vehicle registration of 253,488. There were 30,497 trucks registered. Of these 2,639 trucks exceeded two tons capacity, of which *only 328 exceeded three tons*

capacity, and of this 328 *only 19 exceeded four tons capacity.* Carriers for hire use two to three tons capacity semi-trailer outfits of which class 522 were registered in 1933 and 2,306 in 1936; and no other type has increased in proportion (R. 229). The number of vehicles used for hire in intrastate and interstate commerce, and registered with the Public Service Commission of the State, totaled 111 operated by common carriers, and 1,202 operated by contract carriers (R. 230-231). The irregular route common carrier is classed as a contract carrier under South Carolina law (R. 231).

The conflicting testimony was directed primarily to the questions as to whether or not the assailed provisions of the State Act bear any relation to conserving the highways, maintenance costs, traffic control, and safety thereon.

On these main issues, the plaintiffs offered four witnesses. Harry Tucker, Professor of Engineering in North Carolina State College, and Director of the Engineering Experiment Station at Raleigh, N. C., testified that the gross weight of a motor vehicle does not enter into the design of a concrete highway, or its equivalent; that gross weight of a vehicle has nothing to do with conserving the highway or the cost of maintaining it. In his opinion, the only test is the wheel load. He did not know much about the highway system of the State, but had made a trip over some of the concrete roads of South Carolina, looked at them, and saw no evidence of undue deterioration and they were well constructed and drained. A map showing the route he traveled on such trip is appendix VII. He testified that it is almost impossible to say what causes a failure of pavement, especially a concrete pavement, there are so many factors entering into it (R. 125). He was informed by the South Carolina Highway Department that two sections of concrete pavement are used on the roads he examined; one, 7½-6-7½ which means 7½ inches thick at

the edges and 6 inches thick in the center; and the other 8-6½-8. He expressed the opinion that the concrete roads that he examined will carry a wheel load of from 8,000 to 8,500 pounds, or an axle load of 16,000 to 18,000 pounds safely. He said: "As to how we determine that, we have methods developed originally by Mr. Clifford Older, by the Bureau of Public Roads, by Mr. Westergard, of the University of Illinois, by which, knowing the thickness of a pavement and the strength of the concrete out of which it is constructed, we can determine the wheel load, and therefore, the axle load, which that pavement will carry." He further testified that there is no cumulative stress caused in a concrete pavement by the three axles of a tractor-semi-trailer combination; the three axles, if carrying the same load, and if at least 40 inches apart, each causes a stress in the pavement independently of the other axle; the three axles do not increase the stress. Concrete road sections with a minimum thickness at the center of six inches are good for an axle load of 16,000 to 18,000 pounds. With a tractor semi-trailer combination with three axles the concrete pavement will support approximately 40,000 pounds gross; the front axle of the tractor would bear 8,000 pounds, the rear axle of the tractor 16,000 pounds, and the rear axle of the semi-trailer 16,000 pounds. If another axle could be added to the vehicle 40 inches apart from any other axle and let it carry 16,000 pounds more, the gross load could be increased to 56,000 pounds without doing any additional damage to the pavement. He said in his opinion the roads he examined could carry that load (R. 126-127).

He further testified that figures for the whole country on accidents are the following: For passenger vehicles one accident including death or injury per 100,000 miles; for busses 2.66 such accidents; for intercity trucking 1.69 accidents; the accident ratio is higher for trucks engaged in local deliveries (R. 127-128).

Mr. Tucker stated that he considered that the concrete roads of South Carolina will carry the same loads as the North Carolina concrete roads. He said that the North Carolina roads (where the weight limitations are higher) are in much worse condition than those over which he traveled in South Carolina, but he does not consider the condition of the roads in North Carolina to be due to the heavy trucks; there are so many things that cause the deterioration of a concrete pavement that it is impossible to say it is due to this cause or that cause in any case. He would say in North Carolina there are sub-grade conditions quite different from the sub-grade conditions in South Carolina for one thing. From his observation the sub-grade conditions in South Carolina are most excellent. In North Carolina frost goes quite deep and that makes quite a difference as to the qualities of a concrete road. There isn't much depth to the frost in South Carolina (R. 129-130).

L. W. Teller, engineer employed by the Bureau of Public Roads, testified as a witness for the Interstate Commerce Commission. For 10 years he has been in charge of the Bureau's research in pavement design. The Bureau conducts research and tests and the results are published monthly in its research journal "Public Roads". He testified that the concrete pavement in South Carolina is of typical design; that the gross load is not a factor in the design of concrete paving, but that the critical factor is the wheel load. He expressed the opinion that the standard pavement roads in the State could safely bear a wheel load of 8,000 pounds, with proper pneumatic tire equipment (R. 133). He had no knowledge of the design of the roads and bridges in this State (R. 134). He further testified that the standard pavement roads were the only roads the strength of which could be determined by formula or test; the other types must be judged by observation and he does not know the weights that should be permitted

on them (R. 134). He would not say that a gross load limitation has no connection with the protection of the road, but did state that the 20,000 pounds limit, prescribed by the State statute, would likely limit the maximum wheel load on any type of vehicle to 8,000 pounds, and a few vehicles, loaded to their capacity, could probably carry a wheel load of 8,000 pounds. About one-third of the load is on the front end and two-thirds on the rear (R. 135).

R. W. Knowles, a transportation engineer for a manufacturer of trucks, testified that the tractor semi-trailer type of truck, used in interstate commerce today, is ordinarily designed to carry about 18,000 pounds per axle, or a little less. He expressed the opinion that gross weight does not in any way protect the highways (R. 119) nor was safety on the highways enhanced by such (R. 121). It was his opinion that 40,000 pound trucks could operate as safely as 20,000 pound trucks (R. 122).

C. B. Carley, a trailer salesman, found that he could not operate trucks to come within the limits of the South Carolina Act (R. 155); that South Carolina is the only State that did not permit a width of 96 inches or greater. The States of Florida and North Carolina have recently changed to conform (R. 155). He also stated that Tennessee, Kentucky, Alabama and Texas do not permit a ten ton pay load (R. 155), and expressed the opinion that the gross weight of 20,000 pounds does not relate to safety at all, and implied that the contrary was true (R. 155).

Appellees offered in evidence a portion of a proposed uniform act regulating traffic on highways, prepared and adopted by the National Conference on Street and Highway Safety, as published by the Bureau of Public Roads of the Department of Agriculture in 1934, prescribing that for motor truck vehicles wheel load *should not exceed* 8,000 or 9,000 pounds, and axle load should not exceed 16,000 or 18,000 pounds, depending upon whether the wheels are

equipped with high pressure or low pressure pneumatic tires (R. 277); and prescribing a width of 96 inches for such vehicles. They also offered in evidence along the same lines, recommendations of certain highway associations and others (R. 275-282).

On these issues, the appellants offered three witnesses: J. S. Williamson, Chief Engineer of the State Highway Department; Clifford Older, who originated the first formula used in the designing of concrete paving; and the statement of C. H. Moorefield (now deceased), Chief Highway Engineer from 1920 to 1935, under whom most of the South Carolina highways were constructed, and who testified in the investigation directed by the Legislature in 1931, before the present statute was enacted. Mr. Williamson testified as follows:

In the State highway system there are 2,417 miles of standard pavement, 1,724 miles of bituminous surface type, 1,141 miles of earth type, and 666 miles unimproved (R. 159). The concrete paving is 75 to 80 percent of the total, or 1,800 to 2,000 miles (R. 160). The bituminous surface type is an earth type road covered with an asphalt wearing surface about ¾ of an inch thick. The bituminous surface, earth type, and unimproved roads are quickly impaired and destroyed by heavy truck traffic (R. 161-162-170). There are sections of bituminous surface, earth type and unimproved roads on all roads throughout the State highway system. On some routes there are more weak places than on others (R. 163, 169, 170). There is no definite knowledge as to which roads are traveled most by heavy trucks (R. 163).

There are weak and narrow bridges in many places throughout the State highway system, one not capable of bearing safely more than two tons, one not more than five tons; and of the 50 miles of bridges in the system, 75% have been designed to carry a load not in excess of ten tons (R. 169, 170, 174). There are several bridges 18 feet wide

and one 15 feet wide (R. 164, 167). Trucks have broken floors on bridges from time to time and have knocked hand rails off very often (R. 181).

The load the concrete roads will bear is very indefinite. It depends on a number of different things. Subgrade conditions are a very big factor. Some concrete pavement in one section may hold up 100,000 pounds. The same identical pavement, as far as construction goes, may break up under a two or three thousand pound load. Those subgrade conditions often occur in short distances of one another on the same road (R. 160). Subgrade conditions are about the same in South Carolina as in North Carolina. There is sand subgrade along the coast, some gumbo sections, sand hills, mountainous sections and clay. Frost is sometimes deep enough to disturb some roads (R. 179).

On standard pavement throughout the State the limit of axle weight should be around 13,000 pounds, but there are roads for which that is too much. Greater axle weights are going over the roads now and some of the pavements are failing. Trucks and buses are one cause for such failure, and also subgrade conditions, floods and a little frost. A 16,000 pound axle load is apt to do some damage; the pavement may stand it for a good while but it is bound to break down earlier than if it had a lighter load (R. 187, 188, 195). Under good subgrade conditions the new pavement may support 18,000 pounds axle load but there are weak subgrade conditions, some in short distances of one another on the same roads. Assuming that 90 per cent of the road has no weak spots, axle loads of 12,000 or 13,000 pounds would be heavy enough (R. 179, 160, 182, 187, 189). Maintenance costs amount to one and three-quarter million dollars per annum, no part of which is contributed by the Federal Government (R. 197). The use of bridges for loads exceeding the weights for which they were designed, does not prove their strength (R. 184), and the same is true as to concrete

roads (R. 182, 197). The damage may show up later. Cities and towns of the State have suffered damage to their streets due to the heavy truck traffic (R. 168, 169, 172). Most of these streets were designed only for passenger vehicle traffic (R. 169). The State departed from building standard concrete roads on account of lack of funds, and went to cheaper construction so that they could get people out of the dust and mud (R. 161). (End of Mr. Williamson's testimony.)

Mr. C. H. Moorefield, Chief Engineer of the South Carolina State Highway System prior to July 15, 1935, (now deceased), recommended to the Legislature in 1931 that the truck weight limitation be lowered.

In 1931, the Legislature authorized a committee to investigate motor transportation, and the report of that committee was admitted in evidence (R. 175-176). On November 10th, 1931, Mr. Moorefield appeared before that committee, presented a prepared statement which he had previously submitted as testimony before the Railroad Commission of South Carolina on February 4th, 1931, Exhibit 8 (R. 255-261), and presented also a prepared statement for the investigating committee, Exhibit 9 (R. 261-265). Exhibit 10 is a part of the report of the investigating committee containing their report of Mr. Moorefield's testimony. He stated that if the highways could be designed for a maximum vehicle load not exceeding four tons, which would take care of the ordinary truck having two tons capacity, the average cost per mile of construction would be reduced by at least $3,000 and probably more. The total number of trucks registered for more than two tons capacity plus all busses is about one per cent of all vehicles registered, while the additional $3,000 per mile of highway construction cost in order to provide for this one per cent amounts to 15 per cent of the average per mile construction cost. This means that the State is expending $18,000,000 to accommodate

3,000 vehicles and combinations of vehicles (R. 256-257). Roads which have a small volume of truck traffic have a much lower maintenance cost than roads where there is a large volume of truck traffic (R. 257). Damage caused roads by vehicles is out of proportion to the weight of the vehicles; that is, a five-ton truck will do more than five times the amount of damage that a one-ton truck will do (R. 258). The large and heavy trucks appear to be involved in proportionately more accidents than ordinary vehicles and interfere to a marked extent with the free use of the highways by other vehicles (R. 258-259); they enhance the problem of traffic out of all proportion to the relative number of such vehicles; that even on our 20 foot pavements the average driver of an automobile hates to meet a bus or a large truck and is conscious of being crowded to one side whenever he passes one (R. 259). He recommended to the Legislature that no vehicle with a load capacity greater than five tons should be permitted to be registered (R. 264). The increasing bus and truck traffic is objectionable to the great majority of highway users and the South Carolina highways are not in shape to bear all of the traffic that would be thrown upon them if legislative action encouraged further even gradual substitution of highway carrier service for rail service.

Clifford Older, of Chicago, consulting engineer, testified for appellants as follows:

He was employed by the Illinois Highway Department as an engineer from 1906 to 1917, and as Chief State Highway Engineer from 1917 to 1924. He conducted a test of concrete pavements, known as the Bates test, and devised the first practical formula for concrete pavement design (R. 232). There is no formula to test the strength of any road except a concrete road (R. 239). It is impossible to tell the strength of concrete pavement merely by looking

at it, even though its thickness and width is known. Concrete pavements of the same thickness vary considerably in bearing power. The soil on which it is laid has a good deal to do with it (R. 233-234). A concrete pavement should not bear weight of more than fifty per cent of the ultimate bearing strength. If the stress is ninety per cent the failure will appear almost immediately. If the load stress is a little over fifty per cent, say fifty-five per cent, the failure will not result for a number of years. Stresses of sixty per cent of the ultimate bearing strength cause the road to break within a comparatively short time (R. 235).

The strength of subgrade varies in different parts of the State and even in the same territory approximately. It varies at short intervals along the particular piece of road (R. 235).

Part of the South Carolina concrete pavement does not have longitudinal joints. Pavements having a center thickness of 6½ inches with no longitudinal joint are the weakest in the State. Nature will put a longitudinal crack in it which will separate during low temperature periods. This leaves an unsupported edge 6½ inches thick exposed to the wheels of traffic. Pavements of this kind are not capable of supporting indefinitely wheel loads in excess of 4,200 pounds or axle loads in excess of 8,400 pounds. Pavements having an 8 inch edge thickness, 7½ inch center thickness, and transverse joints should not bear greater wheel loads than 6,400 pounds or axle loads of 12,800 pounds; that is the actual load supporting capacity of the best type of concrete pavement in the State (R. 237-238).

The maximum axle load of 18,000 pounds permitted in many States is an excessive load. In the State of Illinois he built $100,000,000.00 worth of pavement designed to carry a 16,000 pound axle load, 8,000 pound wheel load. Many of those pavements have gone to pieces under such loads, they have been destroyed by the travel. Some of

those roads so destroyed were of approximately the same construction as the South Carolina roads (R. 238). Some are still in service. The witness stated that the whole time he was with the Illinois Highway Department, solid tires were used on those roads, but he observed that the destructive effect of the loads (on the roads) continued just the same after pneumatic tires came into use and, in his judgment, the use of solid tires, as contrasted with the use of pneumatic tires, had nothing to do with the deterioration of the highways (R. 249-250). That is why he wants to be conservative in estimating the bearing strength of a pavement (R. 238). Bituminous surface and earth type roads should be restricted to the use of the average passenger car or truck of equivalent weight and tire equipment (R. 239-240).

The weight of a vehicle has direct relation to its safety. Even though a heavy truck can stop in the same distance as a light car, if both going at the same speed should strike an object, the damage done by the heavier vehicle will be in proportion to its weight as compared with the light vehicle (R. 240).

The width of a vehicle is a factor in the difficulty of passing it from the rear. Where a vehicle is in front of you it is easier to see ahead past the left edge of that vehicle where it is narrow than where it is wide. The angle of vision ahead is cut off in proportion to the width of the vehicle ahead. Six inches in the width of a truck would make a great difference.

The gross load limitation of 20,000 pounds is decidedly generous for the roads of this State. The gross load limitation has relation to the preservation and protection of the highway. If commercial vehicles have three axles the 20,000 pounds gross weight limitation would put the axle weights down to reasonable limits with respect to the

carrying capacity of the roadways of the State. It is difficult to enforce highway laws. A gross load limitation law is easier to enforce than an axle load limitation. For a part of the time while he was Illinois State Highway Engineer he had the direction of the highway police and both methods of enforcement were tried (R. 244). This witness did not agree with any statement that the main standard highways of South Carolina would carry axle weights of 18,000 pounds (R. 250). He stated: "In my experience as an engineer in the years past, working for the State of Illinois, I have never contemplated that the roads of this country would be subjected to the burdens that are now being imposed on them by heavy trucks" (R. 242-243). (End of Mr. Older's testimony.)

Specifications of Errors.

(With Respect to the Motion to Dismiss.)

1. The District Court erred in denying defendants' motion to dismiss the bill.

2. The District Court should have held, on defendants' motion to dismiss the bill, that the facts alleged in the bill, taken in connection with facts judicially known to the Court, failed to establish that the contested weight and width limitations of the South Carolina statute were unreasonable and did not bear a direct and substantial relation to the preservation of the highways and to the safety of other travelers making a normal use thereof, and should have held that they affected interstate commerce only incidentally, and should have dismissed the bill.

(With Respect to Findings of Fact.)

3. The District Court erred in its finding of fact numbered 17, wherein it found, with reference to the 2417 miles

of standard pavement roads in South Carolina, that "All such pavement is capable of sustaining without injury a wheel load of 8,000 to 9,000 pounds or an axle load of 16,000 to 18,000 pounds, depending upon whether the wheels are equipped with high pressure or low pressure pneumatic tires.", in that such finding is not justified by the evidence.

4. The District Court erred in its finding of fact numbered 18, wherein it found, with reference to the standard paved roads of South Carolina, that they "are capable of carrying the commerce which has been developed by modern truck transportation; that federal highways numbered 1, 15-A, 17, 21, 25, 29 and 52 comprise the great arteries of interstate commerce through the state of South Carolina, are of standard concrete paving as above described, with (fol. 109) the exception of a few short stretches, a few miles in length which are not of sufficient importance to justify the denial of the use of these arteries of commerce for the purpose for which they were constructed.", in that (1) such finding is not justified by the evidence, and (2) there is no substantial or specific evidence to show that the weak sections of roads excepted in this finding are either few in number or only a few miles each in length.

5. The District Court erred in its finding of fact numbered 19, wherein it found, with reference to bridges on the highway system of South Carolina, "that there are a few old bridges on the main arterial highways above mentioned and also on the other roads paved with standard concrete paving which were not designed for carrying trucks of greater weight than 20,000 pounds and a few which are too narrow to permit the use of trucks 96 inches in width, and as to these the provisions of the law cannot be deemed unreasonable; but that, as these bridges are few in number and it would be unreasonable to exclude interstate commerce from the entire highway system on their account, such of

them as are considered by the State Highway Department to be unsafe for use by trucks of greater width than 90 inches or greater weight than 20,000 pounds should be so marked so as to afford ample warning that the use of the bridge is forbidden to trucks of that size and weight.", in that (1) the evidence fails to establish that the old bridges, not designed for carrying trucks of greater weight than 20,000 pounds and too narrow to permit the use of trucks 96 inches in width, were few in number; and (2) the evidence does not justify the Court in assuming the prerogative of imposing conditions upon which the sovereign State may enforce an admittedly valid statute.

6. The District Court erred in its finding of fact numbered 20, wherein it found "That the effect on the highways and bridges of the state of South Carolina of a tractor-(fol. 110) semi-trailer combination is not different from the effect produced by two vehicles of equal weight, one following the other; and that the provision requiring that the tractor-semi-trailer combination be considered as one unit for the application of the weight limitation is unreasonable.", in that such finding is not justified by the evidence.

7. The District Court erred in its finding of fact numbered 21, wherein it found "That the rigid type highways of the state of South Carolina are typical of the design of the highways of that type in a great majority of the states in the United States today, and that they will permit axle loads of 16,000 to 18,000 pounds to be hauled thereon without damage to said highways. That they have been subjected to the traffic of heavy trucks with gross weights in excess of 20,000 pounds and other vehicles since 1930 and are now being subjected to such traffic and there is no evidence of deterioration thereof as a result of such traffic except in isolated instances due to unusual conditions.", in that (1) such finding is not justified by the evidence, and (2)

there is no material or definite evidence in the record that such highways have been subjected to the traffic of heavy trucks with gross weights in excess of 20,000 pounds and other vehicles since 1930; and (3) there is a failure of evidence to prove that there was no substantial deterioration of such highways as the result of such excessively heavy traffic.

8. The District Court erred in its finding of fact numbered 22, wherein it found "That gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but wheel or axle weight; that vehicles engaged in interstate commerce are so designed and the pressure of their weight is so distributed by their wheels and axles that heavy gross loads can be carried over concrete roads without damage to the concrete surface; and that a gross weight limitation of 20,000 pounds is unreasonable as a means of preserving the highways", in that (fol. 111) (1) such finding is not justified by the evidence, and (2) a gross weight limit is reasonable and easy of enforcement.

9. The District Court erred in its finding of fact numbered 23, wherein it found "That the gross load limitation has no reasonable relationship to the safety of the public using the highways; that the modern type vehicles engaged in interstate commerce are safer on the highways than the overloaded light trucks which would result from enforcement of the gross load limitations, because they make possible a better distribution of weight and have better braking equipment", in that (1) such finding is not justified by the evidence, and (2) the Court wrongfully assumes, as a premise of its finding, that light trucks will be overloaded in violation of the law.

10. The District Court erred in its finding of fact numbered 24, wherein it found "That the width limitation of

90 inches is unreasonable when applied to the standard concrete highways of the State and the arteries of interstate commerce heretofore mentioned, in view of the fact that all other States in the Union permit a width of 96 inches, this is the standard width of trucks engaged in interstate commerce, and the enforcement of the 90 inch limitation would exclude from the highways a large portion of the equipment now used in interstate commerce without material advantage to the safety or preservation of the highways", in that the finding is not justified by the evidence.

11. The District Court erred in its finding of fact numbered 26, wherein it found that the weight and width limits imposed by the statute "* * * are unreasonable restrictions when applied to the highways heretofore mentioned which constitute the great arteries of interstate commerce of the state and the other standard concrete highways constituting a part of the state highway system; and that as applied to said highways they constitute an unreasonable restriction and burden on interstate commerce; * * *", in that such finding is not justified by the evidence.

(fol. 112) 12. The District Court erred in its finding of fact numbered 27, wherein it found "That the enforcement of the said provisions of the act against the plaintiffs while they are engaged in interstate commerce would in large measure destroy their interstate business, would subject them to ruinous penalties if they should attempt to carry on said business, and would otherwise inflict upon them great and irreparable injury", in that such finding is not justified by the evidence.

(With Respect to Findings of Fact in Opinion.)

13. The District Court erred in finding as a fact in its Opinion (typed page 13), with reference to the effect of heavy traffic on the streets of towns and cities of the State,

that "There is no showing, however, that there has been substantial damage to any streets as a result of the heavy traffic which has been passing over them for the past five years, and no reasonable ground to apprehend such damage in the future", in that (1) such finding is not justified by the evidence, (2) there is no substantial or definite evidence negativing substantial damage to such streets, and (3) the Court shifts the burden of proof from plaintiffs to defendants.

14. The District Court erred in finding as a fact in its Opinion (typed page 21) "Here we have a connected system of standard highways of the finest character; and there is no reasonable relation between the limitations complained of and the preservation of safety of such highways. In the light of experience and of scientific knowledge, there is no ground for reasonable difference of opinion as to the gross load limitation of 20,000 pounds not being necessary for the protection of such roads themselves, and there is even less justification for the requirement that the tractor-semi-trailer combination be counted one unit for the purpose of computing gross load. So far as safety is concerned, the evidence shows clearly that there is less danger to traffic from the standard trucks of interstate com-(fol. 113)merce than from smaller trucks carrying a load for which they are not designed; and certainly there is not enough advantage in a 90 over a 96 inch width to justify the exclusion from an 18 or 20 foot highway of trucks of a width permitted by all other states of the Union", in that (1) such finding is not justified by the evidence, and (2) is contrary to the light of experience and scientific knowledge in such respect; and (3) the Court assumes that smaller trucks will be overloaded in violation of law.

(With Respect to Facts that Should Have Been Found.)

15. The District Court should have found as a fact that the contested weight and width limitations of the South Carolina statute were reasonable and bore a direct and substantial relation to the preservation of the highways and to the safety of other travelers making a normal use thereof, and that they affected interstate commerce only incidentally.

16. The District Court should have found as a fact that there was a substantial and material difference of opinion and judgment on the factual question whether the contested weight and width limitations of the South Carolina statute were reasonable and bore a direct and substantial relation to the preservation of the highways and the safety of other travelers making a normal use thereof, and affected interstate commerce only incidentally.

17. The District Court should have found as a fact that the contested weight and width limitations of the South Carolina statute were not an unreasonable burden on interstate commerce, and affected it only incidentally.

18. The District Court should have found as a fact that the highway system of South Carolina was constructed by the State, as its own property, with its own funds, excepting only those obtained from federal aid, and was intended, designed and constructed only for passenger automobiles and light traffic in trucks, and that the enormous increase in heavy truck traffic, which has since developed, and the use of the highways for substantial and heavy traffic in (fol. 114) heavy trucks, has and will materially damage them.

(With Respect to Conclusions of Law.)

19. The District Court erred in its conclusion of law numbered 1, that the weight and width limitations of the

South Carolina statute are an unreasonable burden on interstate commerce when applied to trucks operating on the designated and standard concrete highways of South Carolina, in that the evidence and facts judicially known show such limitations to be a valid exercise of the police power of the State as to such designated and standard concrete highways, and that they affect interstate commerce only incidentally.

20. The District Court erred in its conclusion of law numbered 5, to the effect that plaintiffs are entitled to injunctive relief restraining defendants from enforcing the weight and width limitations of the statute while plaintiffs are engaged in interstate commerce upon the designated highways and standard concrete highways of South Carolina, in that (1) the evidence and facts judicially known show such limitations to be a valid exercise of the police power of the State as to such designated and standard concrete highways, affecting interstate commerce only incidentally, and (2) the Court should have limited the injunctive relief to trucks not exceeding the weight limits which the Court itself found to be reasonable and proper maximum weight limits.

21. The District Court should have concluded that the contested weight and width limitations of the South Carolina statute were a valid exercise of the police power of South Carolina and not an unreasonable burden on interstate commerce as to plaintiffs.

22. The District Court having concluded (conclusion of law numbered 4) that the weight and width limitations of the South Carolina statute are not violative of the due (fol. 115) process and equal protection clauses of the Fourteenth Amendment, erred in concluding (conclusion of law numbered 1) that the same limitations, in the same circumstances, are violative of the commerce clause of the Fed-

eral Constitution, in that the latter conclusion is repugnant to and inconsistent with the former.

23. In its consideration of the evidence and facts within judicial knowledge, the District Court throughout the case misapplied the rule that plaintiffs bore the burden of proving that the contested weight and width limitations of the South Carolina statute were unreasonable and arbitrary and had no direct or substantial relation to the preservation of the highways or the safety of others making a normal use thereof, and cast upon the defendants the burden of proving the negative of such propositions.

(With Respect to Decree.)

24. The District Court erred in enjoining defendants (Decree, Section 1) from enforcing against plaintiffs while engaged in interstate commerce on the highways of the State of South Carolina numbered 1, 15-A, 17, 21, 25, 29 and 52, or on such portions of other federal aid highways as may be of standard concrete or concrete and asphalt construction, the contested weight and width limitations of the South Carolina statute, in that they are a valid exercise of the police power of South Carolina, affecting interstate commerce only incidentally, and are not an unreasonable burden on such commerce.

25. The District Court erred in enjoining defendants (Decree, section 1) from enforcing against plaintiffs while engaged in interstate commerce on the highways of the State of South Carolina numbered 1, 15-A, 17, 21, 25, 29 and 52, or on such portions of other Federal aid highways as may be of standard concrete or concrete and asphalt construction, the contested weight and width limitations of the South Carolina statute, without limiting the protection of the injunction to trucks with a wheel load not exceeding (fol. 116) 8,000 to 9,000 pounds, or an axle load not

exceeding 16,000 to 18,000 pounds, depending upon whether the wheels are equipped with high pressure or low pressure pneumatic tires, in accordance with its finding of fact numbered 17.

26. The District Court, having found as a fact in its Opinion (typed page 12), with reference to the development of modern transportation units, that "* * *. with this modern equipment it is possible to move a heavily loaded truck over the highway with no greater injury to the modern standard pavement than would result from the movement over it of an ordinary passenger car", erred in not limiting the protection of its injunction to modern equipment, of such a character and having such non-injurious effect on the standard pavement.

27. The District Court erred in substituting its judgment as to the weight and width limits of trucks necessary to preserve and promote safety on highways numbered 1, 15-A, 17, 21, 25, 29 and 52, and on such portions of other Federal aid highways as may be of standard concrete or concrete and asphalt construction, for the judgment of the Legislature of South Carolina in this respect, when the evidence showed a dispute among fairminded men as to necessary and proper weight and width limits, thereby usurping the prerogative of the State of South Carolina.

28. The District Court erred (Decree, section 2) in conditioning the right of the State of South Carolina to enforce its statute (admittedly valid) as to bridges too weak and too narrow, upon the erection of signs at such bridges, and the enforcement of the valid law with reference thereto, thereby usurping the prerogative of the sovereign State of South Carolina.

29. The District Court erred in its Decree (section 1) in that the effect of the injunction granted is that the sover-

eign State of South Carolina must classify the highways of the State Highway System for the purpose of enforcing its valid police regulations, first, as between Federal aid high- (fols. 117-127) ways and non-Federal aid highways; second, as between specified highways extending as units across the State and other highways of the State Highway System; and, third, as between sections of highways paved with standard pavement and other sections of the same highways of different construction.

30. The District Court erred in not holding that the State of South Carolina built its highways with its own money, except for some funds received from Federal aid, that it owns them and has the right to use them, and has the absolute right to fix the limits on weight and width of vehicles which may be operated thereon; and that the District Court was without authority to supplant the judgment of the General Assembly of South Carolina as to the proper weight and width limits of vehicles using such highways.

Summary of Argument.

I.

The District Court should have held, as a matter of law, the statute is a valid exercise of the State's police power and is not subject to judicial restraint.

II.

The evidence of record and facts of which the Court may take judicial notice compel the conclusion that the assailed provisions of the statute constitute a reasonable exercise of the State's reserved police power for the purpose of providing protection for the highways and of promoting public safety and convenience.

1. The weight of the evidence in regard to which there is a conflict does not support the Court's conclusion that

the Act is unreasonable as to the roads subject to the decree.

(a) The weight of the evidence as to the ability of the pavements to bear wheel loads of 8,000 to 9,000 pounds does not support the Court's conclusion in that respect, which was its basis for concluding that the gross load limitation is unreasonable, and the conflict in the evidence was such as to leave a fairly debatable question.

(b) The evidence of record and evidence and facts of which the Court may take judicial notice show a real, direct and practical relationship between the 20,000 pounds weight limitation, as applied to both single units and combinations, and the preservation of concrete pavements in South Carolina, and show such limitation to be proper.

(c) The facility of compliance with a gross load limitation justifies it as a valid measure, preferable to a wheel load limit, since it bears a practical relationship to the protection of the pavement.

(d) An absolute and independent justification of the South Carolina gross load limitation exists in the varying subgrade conditions found.

(e) The provision in Section 2 that a tractor-semitrailer combination shall be considered as one vehicle for the purpose of the 20,000 pounds gross weight limitation, is valid.

(f) The width limitation of ninety inches is valid.

2. The decree was based upon the premise that there is a well connected system of concrete roads in South Carolina and the record does not show that such well connected system exists.

3. The statute is reasonable and necessary as a means of protecting all of the highways and bridges in the State and as a means of promoting safety in their use and the Court erred in holding it unreasonable because it had concluded that it was unreasonable as applied to vehicles on a limited portion of the State's highways.
4. Crediting appellees' evidence with all the effect which may properly be attributed to it, the reasonableness of the statute remains a fairly debatable question which should have been left to the Legislature.

III.

The Court's conclusions as to the invalidity of the statute are erroneous because based upon improper tests of reasonableness.

IV.

The District Court had no power to classify the roads and bridges or to rewrite the width limit as those are legislative functions; and lacking such power the Court was required under the evidence and applicable law to hold the entire statute valid as to all roads and bridges.

ARGUMENT.

I.

The District Court should have held, as a matter of law, the statute is a valid exercise of the State's police power and is not subject to judicial restraint. (Assignment of Errors Nos. 1, 2, 19, 24, 30).

The nature of the statute is such as to clearly show that it was enacted as a police measure to preserve the highways and to promote safety in their use. The declaration of policy set forth in Section 1 (Appendix 1, p. 146) ex-

pressly states the legislative intent in that respect. Such action provides:

> "SECTION 1. *Public Policy.*—Be it enacted by the General Assembly of the State of South Carolina: It is hereby declared to be the public policy of this State that heavy motor trucks, alone or in combination with other trucks, increase the cost of highway construction and maintenance, interfere with and limit the use of the highways for normal traffic thereon, and endanger the safety and lives of the traveling public, and that the regulations embodied in this Act are necessary to achieve economy in highway costs, and to permit the highways to be used freely and safely by the traveling public."

It is well settled that if there is a real, substantial, or even reasonably conceivable relationship between the statute, as a means, and a legitimate end sought to be attained by its effect, the statute is a reasonable and valid exercise of the State's police power. The statute in question shows on its face that there is not only a real and substantial but an *obvious* relationship between the gross weight and width limitations of motor vehicles and the damage they do to public highways and the danger and inconvenience to those who use them. The assailed limitations are such as to show on their face, under controlling decisions of this Court, that they are a reasonable exercise of the State's admitted police power. The lower Court should have sustained the statute without hearing appellees' evidence and, failing that, should have dismissed appellees' bill at the conclusion of their evidence as none of it was sufficient to distinguish this case from those previously decided by this Court.

Decisions of this Court have clearly established the principles which are applicable and controlling in the instant case.

Morris v. *Duby*, 274 U. S. 135;
Sproles v. *Binford*, 286 U. S. 374;
Stephenson v. *Binford*, 287 U. S. 251;
N. Y., N. H. & H. R. Co. v. *New York*, 165 U. S. 628;
Bradley v. *Public Utilities Commission*, 289 U. S. 92;
Silz v. *Hesterberg*, 211 U. S. 31;
Hudson County Water Co. v. *McCarter*, 209 U. S. 349;
Geer v. *Connecticut*, 161 U. S. 519.

The District Court, while realizing to some extent the importance of *Morris* v. *Duby* and *Sproles* v. *Binford* (R. 75), finally failed to understand their true meaning. The District Court clearly did not comprehend that the facts and conditions present in those cases, and the contentions made by the plaintiffs, were substantially the same as here.

In *Sproles* v. *Binford, supra* (286 U. S. 374), a Texas law fixed a seven thousand pound net load limitation. The opinion in that case answers every claim made by appellees here. See especially pp. 388, 390, 394. Furthermore we have examined the record and briefs filed here in that case. The plaintiffs' evidence there was precisely similar to appellees' here, and was the following: (1) That the Texas seven thousand pounds net load limitation law repealed a previous law which had permitted a thirty thousand pounds gross load provided the axle load did not exceed sixteen thousand pounds. (2) Several engineers, one from the U. S. Bureau of Public Roads, testified that a net load limitation has no relation to highway preservation; that the Texas law is unreasonable and arbitrary in that highway damage can be prevented only by laws prescribing maximum wheel and axle weights; that the repealed law adequately protected the highways and was similar to the laws of most of the other states. The testimony of Thomas H. MacDonald, Chief of the United States Bureau of Public Roads, before the Interstate Commerce

Commission, shown in the Record in the instant case, p. 281, was also introduced in the *Sproles* case. All of the expert engineering evidence introduced by appellees in the instant case was duplicated in the *Sproles* case, but in the *Sproles* case more engineers testified and the evidence went further than in the present case. (3) That the enforcement of the Texas law will cause great loss to motor vehicle carriers and shippers. The District Court in Texas found that the carriers who had operated in interstate commerce profitably under the old law could not operate their vehicles under the seven thousand pounds net load limitation except at a loss; that trucks usable in neighboring states could not be used in Texas, necessitating transfer of the cargo to smaller trucks at the border.

In response to these claims of plaintiffs in the *Sproles* case this Court said (pp. 388-390):

> "Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure. Ohio Oil Co. *v.* Conway, 281 U. S. 146, 159. When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the Courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome."
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> * * * * * * *
>
> "The objection to the prescribed limitation as repugnant to the commerce clause is also without merit. The Court, in Morris *v.* Duby, supra (274 U. S. 143), answered a similar objection to the limitation of weight by the following statement, which is applicable here:

'An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens.' In the instant case there is no discrimination against interstate commerce and the regulations adopted by the State, assuming them to be otherwise valid, fall within the established principle that in matters admitting of diversity of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act. Minnesota Rate Cases (Simpson *v.* Shepard, 230 U. S. 352, 399, 400). As this principle maintains essential local authority to meet local needs, it follows that one State cannot establish standards which would derogate from the equal power of other States to make regulations of their own.''

Particular attention is called to the fact that *Morris* v. *Duby* was decided on motion to dismiss, that no evidence was submitted and that the conclusions of this Court were based upon the face of the order of the Oregon Highway Commission. In both *Morris* v. *Duby* and *Sproles* v. *Binford* the gross weight of vehicles and combinations was limited to an amount *less* than that permitted by the statute in this case. Interstate commerce was involved which was carried on over Federal Aid roads.

The case of *N. Y., N. H. & H. R. Co.* v. *New York, supra*, is persuasive on the immediate point under discussion. There a New York statute prescribed the manner in which railroad passenger cars used within New York, both in intrastate and

interstate commerce, should be heated. In that case the Court said:

> "The statute in question had for its object to protect all persons traveling in the State of New York on passenger cars moved by the agency of steam against the perils attending a particular mode of heating such cars. There may be reason to doubt the efficacy of regulations of that kind. But that was a matter for the State to determine. We know *from the face of the statute* that it has a real, substantial relation to an object as to which the State is competent to legislate, namely, the personal security of those who are passengers on cars used within its limits." (Italics ours.)

In *Bradley* v. *Public Utilities Commission,* 289 U. S. 92. The Court held a State had power to bar an interstate motor vehicle carrier from the use of a certain highway to avoid traffic congestion. While the opinion states that the motor carrier had failed to show that no other route was open to him, a careful reading of the Court's opinion makes it plain that the decision did not turn on that point; what the Court did was to broadly sustain the power of a State over interstate commerce in the interest of highway safety. The Court distinguished cases in which it had held invalid State laws intended as regulations of the business of those using in interstate commerce the highways and made clear the distinction between such commercial regulation of interstate commerce and regulation by a State in the interest of highway safety. The Court said:

> "In the case at bar, the purpose of denial was to promote safety; and the test employed was the congestion of the highway. *The effect of the denial upon interstate commerce was merely an incident.*" (Italics supplied.)

Other cases not involving highway conservation laws directly support the foregoing cases in principle. In *Silz* v. *Hesterberg, supra* (211 U. S. 31), a law forbade the posses-

sion of game birds during the closed season in New York, whether killed within the state of New York or elsewhere. The defendant was convicted of possessing game birds killed in Russia during the open season there and imported to New York during the New York open season, but retained by him during the closed season in New York. It was admitted that the imported birds were readily distinguishable both while feathered and otherwise from any game birds native to New York. This Court nevertheless upheld the New York law on the principle, applicable here, that in the *safe-guarding of the State's property* the State legislature is the *sole judge of the necessity or expediency of the means adopted,* assuming such means to have *any relation whatosever to the preservation of game in the State.* The Court said:

> "It is contended, in this connection, that the protection of the game of the state does not require that a penalty be imposed for the possession out of season of imported game of the kind held by the relator. It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations, the legislature of the state is authorized to pass measures for the protection of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted. In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the state, a misdemeanor."

See also *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, *Geer* v. *Connecticut,* 161 U. S. 519.

The Court's particular attention is called to the case of *State ex rel. Daniel* v. *John P. Nutt Co.*, 180 S. C. 19, 185 S. E. 25, certiorari denied 297 U. S. 724. In the *Nutt* case the statute here involved was assailed as violative of the due process and equal protection clauses of both the State and Federal Constitutions and the Commerce Clause of the latter. The South Carolina Supreme Court, without hearing evidence on the question of reasonableness said at page 29 of its opinion:

> "That there is a direct relation between the weight and size of motor vehicles and the consequent damage to the highways resulting from their use, and the consequent danger to others from their operation, is no longer open to controversy, and reasonable regulations in this respect are within the police power and entirely within the legislative domain.
>
> "The Court here judicially knows that the facts exist, bringing the legislative power into play."

The lower court in this case expressly agreed with the State Supreme Court in its conclusion that the statute does not violate the 14th Amendment of the Federal Constitution. From this conclusion the appellees did not cross appeal. This Court in the *Sproles* case concluded that the Act did not violate the 14th Amendment. The State Supreme Court, in the *Nutt* case, after concluding that these regulations of size and weight did not violate the 14th Amendment, said:

> "It is recognized that the commerce clause of the Federal Constitution goes merely to the extent of inhibiting such regulations as result in discrimination against motor vehicles used in interstate commerce, and does not restrict the state in the exercise of its police power in this respect, so long as the statute applies equally to all."

This is in accordance with the decisions of this Court in the case of *Hendrick* v. *Maryland*, 235 U. S. 610, 622, *Sprout*

v. *South Bend*, 277 U. S. 163, 169, and *Continental Baking Company* v. *Woodring*, 286 U. S. 352, 365.

In *Hendrick* v. *Maryland, supra*, this Court said:

> "In the absence of national legislation covering the subject a state may rightfully prescribe *uniform* regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles —those moving in interstate commerce as well as others." (Italics supplied.)

In *Sprout* v. *South Bend, supra*, this Court said:

> "In the absence of federal legislation covering the subject the state may impose, even upon vehicles using the highways exclusively in interstate commerce, *non-discriminatory* regulations for the purpose of insuring the public safety and convenience." (Italics supplied.)

In *Continental Baking Company* v. *Woodring, supra*, this Court said:

> "Regulations to that end are valid as to intrastate traffic, and *where there is no discrimination* against the interstate commerce which may affect it do not impose an undue burden upon that commerce." (Italics supplied.)

This Court, in the *Sproles* case, after reaching the conclusion that the act in question did not violate the 14th Amendment, concluded therefrom that the Act did not violate the Commerce Clause conditioned however, on two separate provisos (1) That no Congressional legislation has superseded the State's power and (2) that there is no discrimination against interstate commerce.

In the *Sproles* case the Court held that in the absence of the above provisos the *nature of the regulations*, which were precisely of the same nature as those involved here, were such as pertain to "matters admitting of diversity of treat-

ment, according to the special requirements of local conditions," therefore leaving the power in the respective States to "act within their respective jurisdictions until Congress sees fit to act."

Concerning the first of the above provisos, in the *Duby* case, this Court predicated its decision upon the absence of "national legislation especially covering the subject of interstate commerce." This language was quoted by the Court in the *Sproles* case for the same purpose. Manifestly the Court, in using such language, in both cases had reference to the fact that there was no national legislation covering the *size and weight* of motor vehicles used in interstate commerce. It had reference to the well understood rule of supersession. For all of the reasons assigned by the lower Court in its opinion (R. 57 to 64, inc.) in support of its conclusion to that effect (Conclusion of Law No. 3) (R. 84) we submit there has been no supersession by the Congress in its enactment of the Motor Carrier Act, 1935, of any of the State's power in this respect. No such supersession occurred by the enactment of the Federal Highway Act as it was passed before either the *Duby* or the *Sproles* cases. It is a well established principle that where there is a partial occupancy of a field by the Congress and where there is no direct conflict between the Federal and the State legislation both may stand, that in order to bring about supersession the Congressional action must be upon the precise subject matter; and that in the absence of supersession Federal legislation cannot have the *slightest effect* on the State power.

Carey v. *South Dakota*, 250 U. S. 118;
Mintz v. *Baldwin*, 289 U. S. 346;
A. T. & S. F. R. Co. v. *Railroad Commission*, 283 U. S. 380;
Townsend v. *Yeomans*, No. 781, decided May 24, 1937, 81 L. Ed. (Adv.) 840, 847.

Concerning the second proviso, little need be said about the matter of discrimination against interstate commerce in this case. The statute shows on its face that it applies to interstate and intrastate commerce alike. Whether or not the statute operates to prevent equality of competitive opportunity between jobbers and others within the State and those situated in other states is immaterial, for if that constitutes discrimination at all, it is *not discrimination against interstate commerce.*

To sum up, we submit that the statute shows on its face that it is a measure adopted in the exercise of the police power, that from the nature of the limitations, from that which this Court judicially knows, under the rule established in the above cases, there is a direct relation between the statute and the end sought to be accomplished such as to preclude judicial interference; that the subject matter shows on its face that it lies within the field which admits of diversity of treatment according to local circumstances and that there is no discrimination against interstate commerce; and that as a matter of law there has been no supersession of the State's power to act in the premises. We therefore submit that *as a matter of law* the court should have held the statute valid, should have refused to receive appellees' evidence, and, failing that, should have dismissed appellees' bill at the conclusion of their evidence.

II.

The evidence of record and facts of which the Court may take judicial notice compel the conclusion that the assailed provisions of the statute constitute a reasonable exercise of the State's reserved police power for the purpose of providing protection for the highways and of promoting public safety and convenience.

There are approximately 60,000 miles of rural public highways in the State. About 6,100 miles of this have been

specially designated by statute as the State highway system. The State Highway Commission has no authority over any of the remaining mileage in the State, except for streets in towns of less than 2,500 population which form connecting links in the State system. There is also that which is known as the Federal Aid System. Such Federal Aid System constitutes the roads which have been set aside as those upon which Federal funds may be expended for improvement. All of the roads in such Federal Aid System are included within and are a part of the aforesaid State system but not all of the State system is included in said Federal Aid System.

Of the 6,100 miles in the aforesaid State system some 2,417 miles are surfaced with concrete or bituminous concrete. The remainder of the 6,100 miles is surfaced with some other material or not surfaced at all. Of the 2,417 miles surfaced with concrete and bituminous concrete 1,800 to 2,000 miles are of plain concrete and the remaining 417 to 617 miles are constructed with a concrete base covered with bituminous material and are called bituminous concrete.

The decree enjoins the enforcement of the Act as to traffic over highways numbered 1, 15-A, 17, 21, 25, 29, and 52. These numbered roads, for convenience, will hereafter be referred to collectively as the "definite segment." They comprise a total of about 1,134 miles. They are all part of the said State system. They are surfaced partly with concrete, partly with bituminous concrete, partly with bituminous materials on materials other than concrete, partly with macadam or sand-clay and some of such mileage is not surfaced at all. The decree also enjoins the enforcement of the Act against vehicles traveling on "such portions of *other Federal aid highways* as may be of standard concrete or concrete and asphalt construction." Such roads as may be included in the latter provision are not specific-

ally enumerated, and for convenience they will hereafter be referred to as the "indefinite segment." There is no way of definitely determining from the record the aggregate mileage in such indefinite segment. By deduction it is certain the aggregate mileage in *both* segments does not exceed about 2,775 miles and possibly less, dependent upon the explanation of appellees' exhibit 6 as will be hereafter discussed.

Appellees' case is based upon the assertion that the highways of the State are capable of sustaining, without injury or danger, loads greater and vehicles wider than those permitted under the statute. The court found (R. 84) that all provisions of the act are reasonable and not an undue burden on interstate commerce in so far as the 57,225 or more miles of roads not included in either the definite or indefinite segments are concerned, constituting about 96 per cent of all the mileage in the State. This 96 per cent includes some of the mileage in the State system and all of that not in such system.

The appellees did not appeal from any of the lower court's action. There is no conflict in the evidence with reference to the roads not included in the two segments. The only testimony as to the capacity or strength of any of the roads *other* than concrete or bituminous concrete or the effect of truck traffic upon them is that of J. S. Williamson (R. 161, 162, 170) and L. W. Teller (R. 134). Teller testified that as far as he knew the weight that can be permitted on pavement of the bituminous type cannot be determined analytically or by tests. Williamson's testimony to the effect that traffic by vehicles heavier than the ordinary automobile is damaging to types of surfacing other than concrete or bituminous concrete is not controverted.

The only reason given by the court for extending the effect of the injunction to the mileage of pavement within the definite segment which is surfaced with materials other

than concrete or bituminous concrete was that such mileage consisted of "a few short stretches, a few miles in length, which are not of sufficient importance" to justify the denial of their use by heavy vehicles (Finding of fact 18, R. 81). The only conflict in the testimony is with reference to the capacity or strength of concrete and bituminous concrete pavement. The lower court's decree rests entirely on its findings and conclusions with reference to such pavement.

It is to be kept in mind that the validity of the decree is not to be tested by determining whether there is evidence to support the findings *on which the decree is based.* The proper inquiry is whether there is adequate evidence to support the *action of the Legislature.* If there is it makes no difference that there is opposing evidence. This principle has been applied in numerous cases involving the constitutionality of laws enacted, as here, to effectuate State police power. This Court has reviewed the facts and reversed decrees of lower courts which failed to adhere to this rule. *Standard Oil Co.* v. *Marysville,* 279 U. S. 582; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365.

This test was also applied in *Sproles* v. *Binford, supra* (286 U. S. 374).

This rule applies to statutes assailed as violative of the Commerce Clause. *N. Y., N. H. and H. R. Co.* v. *New York,* 165 U. S. 628, p. 632; *N. C. and St. L. R. Co.* v. *White,* 278 U. S. 456, p. 459; *Silz* v. *Hesterberg,* 211 U. S. 31, p. 39; *McLean* v. *D. and R. G. R. R. Co.,* 203 U. S. 38, p. 54.

In addition to the foregoing, it is well settled that in cases in equity, even in private causes not involving the validity of statutes "findings may be revised at the instance of an appellant, if they are against the weight of the evidence," *Morley Construction Co.* v. *Maryland Casualty Co.,* 300 U. S. 185, 191. See also *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321; *Liberty Oil Co.* v.

Condon National Bank, 260 U. S. 235; *Radio Corporation* v. *Radio Engineering Laboratory*, 293 U. S. 1.

1. *The weight of the evidence in regard to which there is a conflict does not support the court's conclusion that the Act is unreasonable as to the roads subject to the decree.*

(a) The weight of the evidence as to the ability of the pavements to bear wheel loads of 8,000 to 9,000 pounds does not support the court's conclusion in that respect, which was its basis for concluding that the gross load limitation is unreasonable, and the conflict in the evidence was such as to leave a fairly debatable question (Assignment of Errors Nos. 3, 7, 8, 11, 16 and 23).

The court found the 20,000 pounds gross weight limitation unreasonable as to *concrete and bituminous concrete roads only*. Two findings of fact are stated to sustain this conclusion. They are (1) that wheel or axle weight is the only factor to be considered in the preservation of concrete highways, and, (2) that such pavements can safely bear wheel weights of 8,000 to 9,000 pounds and consequent axle weights of 16,000 to 18,000 pounds (Findings of Fact Nos. 17, 21, and 22, R. 81-83).

The court found the statute reasonable, however, as applied to all of the 57,000 miles of roads in the State not surfaced with concrete or bituminous concrete. The court thus held as against appellees' general prayer for injunction (R. 19) and showing as to the desirability of injunction as to all roads (R. 76-108, 145, 152, 153, 199), that a gross weight limitation statute is not *per se* unreasonable as an exercise of legislative discretion. What the court held was that a gross weight limitation is unreasonable

only when it unduly restricts the use of what the court conceived to be scientifically permissible wheel loads. This follows necessarily from the court's findings, conclusions and decree. Hence the court's conclusion that the 20,000 pounds gross weight limitation is unreasonable as to the concrete roads rests entirely upon its findings that such roads will safely bear wheel loads of 8,000 to 9,000 pounds and, therefore, the 20,000 pounds gross weight limitation is unreasonably restrictive.

It may be objected that the court's conclusion as to the unreasonableness of the gross weight limitation and as to the necessity of applying the wheel load test, in considering reasonableness, refers only to concrete roads, and that for entirely different reasons the court held the gross weight limitation reasonable as to non-concrete roads. Such objection would be without merit. *The only evidence on the point* shows wheel load to be one of the primary factors in relation to the preservation of non-concrete roads (R. 160, 162, 169, 170). The witness Williamson testified, regarding such flexible roads, that heavy traffic on such roads immediately caused failures and ruts would develop in the surfacing and that the wheels of the truck would sink down in there and that the shoulders would push up (R. 161-162). Reflection indicates that excessive wheel load (that is, excessive for the particular type of road) is more damaging to non-concrete than to concrete roads because the latter have beam strength which spreads the load over a larger area. In fact, the greater the beam strength the lesser the importance of wheel load as contrasted with gross load (see R. 170, 171).

To summarize, the court held the gross weight limitation unreasonable as to concrete pavements, only because the statute prevented the use of wheel loads of from 8,000 to 9,000 pounds, and held the statute not per se unreasonable

by concluding that it is reasonable as to roads capable of supporting lesser wheel loads. Therefore, the court's conclusion that the 20,000 pounds gross weight limitation is unreasonable rests directly on its erroneous conclusion that the concrete pavements will safely bear wheel loads of from 8,000 to 9,000 pounds.

If it is pertinent to the issues here we submit that an analysis of the evidence shows *first*, that the appellees failed to sustain the burden of proving that the concrete pavements here involved will safely bear wheel loads of 8,000 to 9,000 pounds, and that the weight of such evidence does not support the court's conclusion in that respect, and, *second*, that the evidence affirmatively shows a conflict on that point which was such as to show a fairly debatable question and to thus preclude judicial determination of the subject. From this we submit that, since the finding as to the ability of pavement to support wheel loads of from 8,000 to 9,000 pounds is the premise, and since the premise fails, the court's finding and conclusion, based on such premise, to the effect that the 20,000 pounds weight limitation is unreasonable as applied to traffic on concrete roads, is erroneous.

The witnesses Harry Tucker and L. W. Teller, both nonresidents of South Carolina, and familiar with the highways about which they testified only by reason of brief observation trips, testified that in their opinion the concrete highways would bear wheel loads of 8,000 to 9,000 pounds and axle loads of 16,000 to 18,000 pounds. They both testified that the gross weight of a motor vehicle had nothing to do with conserving the highway. Mr. Tucker testified that where axles are spaced forty inches apart each causes stress in the pavement independently of the other axles.

We desire to call to the court's attention at this time certain conclusions of the witness Teller published by him

in 1926 which appear to be contradictory of his testimony at this point. See footnote (1) below.[1]

Opposed to this testimony is the testimony of J. S. Williamson, the Chief Engineer of the South Carolina State Highway Commission (R. 158), the testimony of Clifford Older (R. 231), a consulting engineer, and the testimony of Charles H. Moorefield before a committee of the Legislature. Mr. Moorefield (now deceased) was for fifteen years prior to July, 1935, Chief Engineer of the South Carolina State Highway Commission. Mr. Older was referred to by Mr. Tucker as the originator of the Bates Road Test and as a prominent highway engineer. Mr. Older was from 1917 to 1924 Chief Highway Engineer of the State of Illinois, and since 1924 has been in consulting practice. The Bates Road Test conducted by him was one of the first

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[1] The proceedings of the Fifth Annual meeting of the Highway Research Board held at Washington, D. C., December 3 and 4, 1925, and published by the National Research Council in 1926, page 67, contain an article by Mr. Teller on "Stress Measurements in Concrete Pavements." This article states the results of an experiment conducted by him on a concrete test road near Harrisburg, Pa. The test pavement was supposed to have edges eight inches thick and center five inches thick, but the center on actual measurement was found to be nearer six inches thick. It was reinforced with steel at the corners and edges and provided with a tongue and groove type of longitudinal center joint. (South Carolina concrete pavement consists of two types with respect to thicknesses: 7½-6-7½ and 8-6½-8, R. 126; and only about 40 per cent of the concrete pavement has the center joint, and none is reinforced with steel, R. 178). The subgrade of this test pavement ranged from an old stone road to 4 inches of sand or cinders on a clay fill. Test was made of each of the sections of this road by a truck whose gross weight was 26,000 pounds, with a maximum wheel load of 9,000 pounds, which was run at its minimum speed along the outside edge of the pavement and along either side of the longitudinal joint three times only. The article states that this test indicated that the stress in the interior of the slab was not excessive under this 26,000 pounds load, but that "The stresses around the edges of the slab, caused by the 26,000 pound gross load, were sufficient in all sections to produce cracking in the extreme fibers of the concrete, but visible cracks did not appear." Apparently this test by Mr. Teller showed that a stronger pavement than the ordinary South Carolina concrete pavement was damaged by *three* trips over it of a truck with a little bit greater gross weight than that permitted by the law in question here.

practical tests of concrete pavement and as a result of that test he originated the first formula proposed for the *design* of concrete roads.

Mr. Williamson stated (R. 160) that the load concrete roads may safely bear is very indefinite. Subgrade conditions are a very big factor entering into it. Some concrete pavement in one section may hold up one hundred thousand pounds. The same identical pavement, as far as construction goes, may break up under a two or three thousand pound load. These subgrade conditions occur right along in the same territory, often in short distances of one another on the same road. Asked what axle weight he would recommend for the standard concrete pavement, he said an axle weight not exceeding around thirteen thousand pounds, and even with that there were concrete roads that would be too much for (R. 187). A sixteen thousand pound axle load will do some damage and is bound to break down a concrete pavement earlier than if it had a lighter load (R. 195). There have been some failures in concrete pavement. There have been quite a number of corner breaks all over the State. By corner breaks are meant breaks of the outer edge of two head joints. These are joints with expansion strip between them (R. 176). Pavement failures are due to trucks. Subgrade conditions, floods and frost are other causes. Mr. Older testified that the best type of concrete pavement in South Carolina should carry no heavier an axle load than twelve thousand eight hundred pounds. That this might be subject to a variation of 1,000 to 2,000 pounds either way. He testified that pavements without center joint are not capable of supporting indefinitely *axle* loads in excess of 8,000 to 8,400 pounds (R. 237). This testimony is not controverted and Williamson's testimony indicates that from 1,080 to 1,200 miles, or 60 per cent of all the concrete pavement in the State is pavement of this type (R. 178). Older also testified that the maxi-

mum axle load of eighteen thousand pounds prevailing in some States is excessive. He bases this answer on the fact that while he was Chief Engineer of the Illinois State Highway Commission he built $100,000,000.00 worth of pavement having the same thickness approximately as those in South Carolina, and that many of these pavements have failed under a sixteen thousand pound axle load. Many of these pavements have gone to pieces and required replacement. That is why he places the maximum axle load for South Carolina pavements at twelve thousand five hundred pounds (R. 238). He further stated that in his opinion a gross load limitation of twenty thousand pounds had relation to the preservation of the highways. He said, "The gross load limitation for the roads of South Carolina is decidedly generous." It is difficult to enforce axle load limits and is easier to enforce gross load limits (R. 242, 243). Mr. Moorefield recommended to the South Carolina Legislature in 1931 that the then existing maximum weight limitation (12½ tons for one vehicle, and 20 tons for a combination of vehicles operated as a unit, see Act No. 575, South Carolina Statutes of 1931, Appendix II, page 153 hereof) be changed so that the maximum load capacity authorized should be five tons (R. 264). The effect of such a change would be to limit gross loads to 20,000 pounds or less (R. 114-R. 139), and in 1933 the Legislature did adopt the 20,000 gross load limitation here under attack. It should therefore be kept in mind that in 1933 the South Carolina Legislature had before it the recommendation of a highly respected highway engineer whose reputation with the Bureau of Public Roads was "most excellent" (R. 134), and who had, in 1933, been Chief Engineer of the South Carolina State Highway Commission for 13 years (R. 158), that the truck weight limitation should be reduced. This evidence is of greatest weight in considering whether the action of the Legislature was arbitrary and unreasonable.

Mr. Moorefield's recommendation was based upon his observation during his many years of service that heavy trucks damage the highways, and that the damage increases progressively and not proportionately as the weight increases (R. 255-270).

At this point we have the testimony of two non-residents of the State, who made a very cursory examination of a few highways, opposed to the testimony of the Chief Engineer of the State Highway Commission, who is in charge of all of the roads of the State and who is responsible for their building and maintenance, plus the testimony of Mr. Older and statements of Moorefield, who built nearly all the present system.

It is apparent that the District Court was greatly influenced by the recommendations of various unofficial bodies to the effect that so-called modern concrete highways can safely bear wheel loads of 8,000 to 9,000 pounds and axle loads of 16,000 to 18,000 pounds. The court paid particular attention to the recommendations of the American Association of State Highway Officials and the National Conference on Street and Highway Safety (Finding of fact No. 25, R. 83). The latter organization developed a proposed Uniform Act Regulating Traffic on Highways (Opinion, R. 70). The proposed act is known as "Act V" (R. 296, 275). The preface to the proposed act and Section 145 thereof appear in R. 275-277. The entire proposed act was designated for printing by appellees' præcipe (R. 296) but only such preface and Section 145 were printed. It will be observed that the proposed act has been published as a government publication by the Bureau of Public Roads of the Department of Agriculture (R. 275); hence we ask the Court to take judicial notice of Section 146 which is printed as Appendix VI, page 159 hereof. And we now therefore particularly direct the Court's attention to the

explanatory note accompanying Section 146 which is as follows:

> "In view of the varying conditions of traffic, and lack of uniformity in highway construction in the several States, no uniform gross weight limitations are here recommended for general adoption throughout the country. For the protection of bridges, the American Association of State Highway Officials recommends the following formula: W equals 700 (L plus 40) where W equals the gross weight in pounds and L equals the length in feet between the centers of the first and last axles of a vehicle or combination of vehicles."

Therefore the District Court was plainly mistaken in its Finding of Fact No. 25 (R. 83) when it stated that a gross load limit of 20,000 pounds is contrary to the recommendation of the National Conference on Street and Highway Safety. Whatever other recommendations they may favor, the bodies proposing the uniform act expressed the opinion that *there should be left to the several States* the question of gross weight limitation because of the varying conditions prevailing in the different States.

Considering now, however, these recommendations as to wheel and axle weight limitations, and suspending for a moment questions that may occur as to the power of theorists in convention to make recommendations that will in effect bind state legislatures, whatever value or effect anyone might hope to obtain from these unofficial recommendations is utterly nullified by the undisputed facts that many "standard concrete pavements" in North Carolina and Illinois, actually built and intended to support without failure these recommended wheel and axle loads, are in fact going to pieces under them (R. 130, 238).

The Illinois situation, where axle weight of 16,000 pounds and gross weight of 40,000 pounds are allowed, but which limits were challenged by interstate motor carriers as un-

reasonable on the very same theories expressed by the lower Court in this case, was described by a Three-Judge Court in *Werner Transp. Co* v. *Hughes,* 19 Fed. Supp. 425, 429:

> "Even under the present legal weight limits, it was necessary for Illinois to spend the sum of $26,715,118.87 between the years 1925 and 1936 in the maintenance, reconstruction and resurfacing of pavement slabs and shoulders upon the paved road system. During the year 1934 the total cost of pavement replacement throughout the state was approximately $191,000. During the year 1935 such replacement cost rose to $248,000. The records for 1936 have not yet been fully compiled but the cost exceeds that of the year 1935. United States route No. 66, between Joliet and Granite City, is a heavily traveled truck route between Chicago and St. Louis. By actual traffic count, the ratio of truck travel on this route, compared with the general average for the state highway system, was 4.5 to 1 during the year 1932 and 4.2 to 1 during the year 1934. The cost of maintenance of route 66 between the years 1925 and 1936, has been the sum of $1,684,363.68 or an average of $763.53 per mile as against an average maintenance cost of $293.20 for the entire highway system of the state. There are highways in Lake County, Ill., which carry heavy truck travel between Chicago and Milwaukee and those that do not. *Both sets of highways are of similar thicknesses, are subject to the same climatic conditions and have the same type of subgrades and similar drainage. In the case of the pavements carrying but little truck travel, the pavements are enjoying comparatively normal lives with low maintenance cost. In the case of the pavements bearing excessive truck travel, they are rapidly disintegrating. Whenever a particular piece of pavement begins to carry heavy truck travel, immediately the life of the pavement begins to go down and the cost of maintenance begins to go up.*" (Italics supplied.)

The record in this case contains eloquent evidence that matters of the character involved in this proceeding are those which not only admit but require diversity of treatment according to the special requirements of local conditions. The National Conference on Street and Highway Safety frankly recognizes that fact. (Appendix VI, page 159). Professor Tucker testified that there is such a difference between local conditions in North Carolina and South Carolina as to possibly explain why North Carolina pavements are suffering more than the pavements in South Carolina (R. 130). Subgrade conditions are of great importance in building highways and such conditions vary in the different states and in different localities in the same State (R. 130, 160, 179, 234). The carrying capacity of pavement obviously depends upon the materials with which, and the specifications according to which, it is constructed. Pavements of various kinds in the respective states are built according to the direction of a multitude of different local and State officials. Even if the millennium of universal uniformity as to design and construction of pavements could be assumed, which is by no means shown to exist, it is obvious that the subgrade, climatic and traffic conditions vary so greatly in the different localities and communities as to positively require diversity of treatment according to the special requirements of local conditions.

Notwithstanding the recommendations of Mr. Moorefield (R. 264) who built most of the South Carolina highways in his 15 years as Chief Highway Engineer (R 158) and whose professional reputation was "most excellent" (R. 134), regardless of the testimony of Mr. Williamson, the present Chief Engineer, regardless of the testimony of Clifford Older, a nationally acknowledged authority and the originator of the first formula for concrete pavement thickness design (R. 126, 129, 237), regardless of the undisputed

evidence that in Illinois and North Carolina pavements are breaking up under what the District Court called "standard wheel and axle loads", the District Court found that the State of South Carolina is unreasonable in prohibiting such loads upon its highways and therefore that the judgment of the South Carolina Legislature in fixing the twenty thousand pounds gross load limitation is unreasonable.

Independently of all of the foregoing, publications of the United States Government of which this Court can take judicial notice contradict and qualify the testimony of appellees' witnesses Teller and Tucker as to the ability of concrete pavements to bear safely wheel loads of 8,000 to 9,000 pounds and axle loads of 16,000 to 18,000 pounds. We refer to the monthly magazine, "Public Roads", published by the Bureau of Public Roads of the United States Department of Agriculture.[2] In the November, 1935 issue, Vol. 16, No. 9, p. 169, is a report written by Mr. Teller himself entitled "Observed Effects of Variations in Temperature and Moisture on the Size, Shape and Stress Resistance of Concrete Pavement Slabs" which sets out therein results of extensive investigations by the Bureau of Public Roads conducted under his supervision of the subject indicated by the title. As a result of these tests and investigations certain important conclusions were reached, one of which is as follows (p. 196):

> "9. For pavement slabs of the size used in this investigation (10 ft. by 20 ft.) or larger, certain of the stresses arising from restrained temperature warping

[2] We refer to this material on the authority of the general principle of judicial notice and the specific instances in which the same and similar matter has been used by this Court. See *Muller* v. *Oregon*, 208 U. S. 412 at 419; *Interstate Transit, Inc.* v. *Lindsey*, 283 U. S. 183 at 190, where Public Roads and other material is cited though not a part of the record; *Morehead* v. *New York*, 298 U. S. 587 at 626-627; *Helvering* v. *Davis*, No. 910 decided May 24, 1937, 81 L. Ed. (adv.) 804 at 809; and *Carmichael* v. *Southern Coal & Coke Co.*, Nos. 724 and 797 decided May 24, 1937, 81 L. Ed. (adv.) 811 at 820-821.

are equal in importance to those produced by the heaviest of legal wheel loads. The longitudinal tensile stress in the bottom of the pavement, caused by restrained temperature warping, frequently amounts to as much as 350 pounds per square inch at certain periods of the year and the corresponding stress in the transverse direction is approximately 125 pounds per square inch. These stresses are additive to those produced by wheel loads."

In the December, 1935, issue of Public Roads, Vol. 16, No. 10, p. 201, the report on these studies is continued and states (p. 219):

"It is apparent, however, that in pavement slabs as they are designed today the factor of safety against breaking must be very small at times when conditions are such as to produce high (temperature) warping stresses. The relatively frequent transverse cracking in our more heavily traveled concrete pavements is also an indication that the combined stresses in them often exceed the flexural strength of the concrete.

"At first thought one might expect immediate cracking when the combined stresses exceeded the strength of the concrete, and this would probably occur if the high stresses extended completely across the slab. When the critical stress is highly localized, as it appears to be under an isloated load, a single application of an excessive stress may produce no immediate effect. In cases where load stresses are responsible either wholly or in part for the cracking of a pavement, it is but natural to expect the transverse cracking to develop gradually and to continue over a period of years.

"Consider, for example, the case of a heavy wheel load moving longitudinally on the pavement at a time when high warping stresses are present in the slab. Being of the same sense in the midsection of the slab, the stresses combine and may exceed the ultimate flexural strength of the concrete. These tests indicate that the high combined stress will be found to exist only for a very short distance directly under each

wheel. The remainder of the cross section will not be over-stressed. It is not probable that such a stress condition would cause a full-length transverse crack immediately, but it is reasonable to believe that a great many repetitions of the condition would cause such a crack."

The above reports lead to this: A concrete pavement slab which is designed to carry an 8,000 pound wheel load under normal conditions will be stressed to the point of failure where such load is applied to the slab when it is in a state of high warping stress produced by temperature. Repetitions of such loads (which are of course inevitable on highways) will cause cracks in the slab, leading to failure, expensive maintenance, and eventual replacement. This indicates the need for great caution before a court should set aside, as arbitrary, the action of a State legislature in fixing weight limitations on the advice of the State engineers. This further indicates the wisdom of Mr. Older's "conservatism" (R. 237-238) in stating that the South Carolina concrete pavements should not be subjected to wheel loads exceeding 4,200 to 6,400 pounds (R. 237). It emphasizes that the various organizations that have advocated permissive wheel loads of 8,000 to 9,000 pounds have, as is usual in such cases, devoted themselves entirely to theory, might have been influenced by selfish interest and certainly overlooked the practical facts.

The 1933 Legislature of South Carolina was not dealing in theory but was at grips with the hard, practical problems of financing and building highways. In fixing the 20,000 pounds gross weight limitation as a means of conserving those highways it followed the recommendation of Mr. Moorefield, who had then been building such highways for thirteen years (R. 264). Mr. Moorefield's integrity and high professional standing have never been challenged. The wisdom of the Legislature is now further attested by the

testimony of Mr. Older and of Mr. Williamson, the present Chief Engineer of the State Highway Commission.

The foregoing analysis conclusively shows that if the ability of the concrete pavements in South Carolina to bear wheel loads of 8,000 to 9,000 pounds is an issue, the appellees failed to sustain the burden of proving it; and that there is a great volume of evidence in sharp conflict with the affirmative evidence on the point and in conflict with the court's conclusion as to the ability of such pavements to sustain wheel loads of 8,000 to 9,000 pounds, which evidence cannot properly be disregarded.

Since the appellees failed to sustain the burden of proving that the aforesaid pavements can safely bear axle loads of 16,000 to 18,000 pounds; since there existed the foregoing conflict in such evidence; since the conclusion of the court with reference to the capacity of such pavement was the basis for its finding and conclusion that the 20,000 pounds weight limitation was unreasonable and hence invalid; and since under established law the court had no power in the face of such conflict in the evidence, to set aside the legislative pronouncement, we therefore submit that the court's decree is erroneous so far as it pertains to the weight limitation assailed and that such decree should be reversed.

b. The evidence of record and evidence and facts of which the court may take judicial notice show a real, direct and practical relationship between the 20,000 pounds weight limitation, as applied to both single units and combinations, and the preservation of concrete pavements in South Carolina, and show such limitation to be proper (Assignments of error Nos. 6, 8, 9, 14, 16, 24).

The court found that there was *no reasonable difference of opinion* as to the gross load limitation of 20,000 pounds,

not being necessary for the protection of the concrete roads and that there was even less justification for the requirement that the tractor-semitrailer combination be counted one unit for the purpose of computing gross load (Findings of Fact 22, 26, R. 83, 84, Opinion R. 73, 75). It is evident from a careful study of the record that in reaching this conclusion the court misunderstood much of the evidence which was plainly before it. Appellees proceeded upon the theory, and the court concluded, that only wheel load or axle load are critical factors in pavement strength (Finding of Fact 22, R. 83). They failed to explain the difference between theoretical factors of *design* and practical factors of *limitation*. At no point in the record did the court have the benefit of a plain, simple translation of wheel load into axle load and then into gross load, yet the relationship is clear and was apparently so obvious to the expert witnesses in the case that no simple explanation was made.

The witness Teller testified (R. 135) in regard to the ratio of axle load to gross load of trucks that "we have weighed a good many of them", meaning the U. S. Bureau of Public Roads, that in general "there is from sixty-five to eighty per cent of the load on the rear end", referring to conventional trucks of two axles, and that according to the most recent data with which he was familiar, and the trucks they had been using in their tests, there was about one-third on the front end and about two-thirds on the rear end when a capacity load was on.

Interesting data upon this subject appear in the United States Government publication, "Public Roads" above referred to. In the May, 1935, issue, Vol. 16, No. 3, appears an article entitled "A Study of The Weights and Dimensions of Trucks". It describes a study made jointly by the U. S. Bureau of Public Roads, certain officials and departments of the State of Maryland, and the Johns Hopkins Uni-

versity, to determine, among other things, how the gross loads of motor vehicles are commonly distributed to the various axles. Data was obtained by weighing trucks at two-week intervals from the middle of June to the middle of November in 1934 at roadside "clinics" on two U. S. routes out of Baltimore which presumably carried the interstate traffic referred to generally in this case. At page 42 appears the following:

> "• • • in the case of single vehicles, the weight carried on the rear axle averages approximately three-fourths of the gross load. Vehicles having gross loads less than 10,000 pounds carried an average of only 68 per cent on the rear axle. The gross weight groups above 10,000 pounds all had an average of close to 75 per cent for weight on the rear axle. Included among these vehicles were many partially loaded trucks, and the low average percentage of load on the rear axle is doubtless due to greater proportionate effect of the engine and the tendency to carry partial loading in the forward part of the truck body. • • • In the case of tractor-semitrailer combinations, it may be seen that about 45 per cent of the entire gross weight of the combination is carried on the rear ends of both tractor and semitrailer, leaving about 10 per cent for the front wheels of the tractor."

It is therefore obvious that, when practical facts about automotive engineering are taken into consideration, a 20,000 pound gross load limitation when translated into axle-loads means that for the standard, two-axle trucks in use there is an *automatic* limitation for the heavier axle of from 13,333 pounds to 15,000 pounds. Since an axle is supported by a wheel or dual wheel assembly at each end a 13,333 pound *axle* limit in practical fact results, when the axle is level, in a *wheel* load limit of 6,666 pounds and a 15,000 pound *axle* limit in a 7,500 pound *wheel* limit. In this connection it is significant that the witness Older

testified (R. 237, 238) that the maximum axle limit which should be permitted on the best concrete pavement in the State is 12,500 pounds, and the witness Williamson (R. 187) that, for protection of all the concrete pavement in the State, an axle load limit of not to exceed 13,000 pounds should be maintained. From this very simple analysis it may be seen that there is a direct and real relationship between the 20,000 pound gross load limit and the protection of the concrete pavement so far as two-axle trucks are concerned. If inaccuracy exists the limit is too liberal, but the legislative judgment might properly have been influenced by other considerations such as the number of such heavy units which might operate, the tax revenue they might produce or even the economic arguments urged by appellees.

However, it is urged by appellees that if axles are spaced forty inches or more apart that neither axle contributes to the stress in the slab which is set up by the other. They then argue that, such being the case, axles may be multiplied indefinitely provided no single axle is overloaded and the 40-inch spacing is maintained and no greater damage will occur to the pavement than through the operation of an ordinary two-axle truck. Although appellees abstract statement to that effect, when understood in the light of practical circumstances, means something entirely different, as we explain in our subdivision (d) of this point, even if such allegation were correct there is an absolute justification for the 20,000 pounds gross weight limitation. As is well known the ordinary type vehicle which makes use of more than two axles is the tractor-semitrailer combination. This consists of a motor unit, called a tractor, with motor and cab, supporting, over its rear axle, the forward portion of a semitrailer, which semitrailer is supported at its rear end by a third axle.

The gross load distribution which occurs over the three axles of a tractor-semitrailer combination in practical operation is described in the above mentioned article in "Public Roads" Vol. 16, No. 3. It shows that about 90 per cent of the entire gross weight of the combination rests on the rear axle of the tractor and the rear axle of the semitrailer, that is, about 45 per cent on each of the last two of the three axles, leaving about 10 per cent for the front axle. It also explains that for single vehicles only about 68 per cent of the gross weight is carried on the rear axles of trucks having a gross weight of not over 10,000 pounds, as against an average of 75 per cent for all trucks, showing that for lighter units it is possible to place a greater percentage of the gross load, in fact as much as 3,200 pounds, on the front axle without impairing steering and "maneuverability". It is reasonable to assume that such is the case with the lighter tractor-semitrailer combinations.

It may thus be seen that a gross weight limitation of 20,000 pounds, as applied to such combinations, when considered in the light of practical experience and, recognizing the manner in which trucks are commonly designed and loaded, automatically and by its own terms, means that the second and third axles shall not exceed from 8,500 to 9,000 pounds, since the front axle will carry from 2,000 to 3,000 pounds.

It may then be urged that such a limit is unreasonable and not necessary for the protection of the pavement. But let us scrutinize the evidence from that standpoint.

The witness Williamson testified (R. 178) that about 60 per cent of the concrete pavement has been built without any center joint. This is not controverted. There are 1,800 to 2,000 miles of concrete pavement (R. 160) which means that there are from 1,080 to 1,200 miles of such pave-

ment without such joint. We assume the witness referred to concrete as distinguished from bituminous concrete. If bituminous concrete is included, the point here urged is stronger. Williamson also testified that all pavement built since 1929 or 1930 had been built *with* center joint, so that the 720 to 800 miles of concrete with such joint was all built since that date. The Act in question was passed in 1933, and, although there is no showing as to the pavement built each year, it is fair to assume that considerably in excess of 60 per cent of the concrete pavement then in existence was without such joint.

At this point the testimony of the witness Older is particularly illuminating (R. 237). He testified, in substance, as follows:

> A pavement may or may not have a longitudinal joint running down the center of the road. Williamson's testimony indicated that part of this pavement did not have longitudinal joints. The concrete pavement having no longitudinal joint having a thickness of six and one-half inches at the center and seven and one-half inches at the edges are the weakest pavements of the lot. It is a matter of common observation that if there is not a center longitudinal joint built into the pavement, nature will put a longitudinal crack in it. Now, when this crack comes it will separate a certain amount due to contraction during low temperature periods. Then at the interior portion of the pavement we have an edge that is only six and one-half inches thick that is exposed to the wheels of traffic. The outer edge has been strengthened to perhaps carry a heavier load, but here is an inner edge that is a weak link in those pavements. For those pavements I would be forced to give an opinion of a load that is quite low. In my judgment, those pavements are not capable of supporting indefinitely wheel loads in excess of about 4000 or 4200 pounds.

There is no specific testimony in the record to controvert Older's statement as to the capacity of concrete pavement without center joint. The only testimony which might be claimed to conflict is that of Mr. Tucker (R. 126) that the pavement over which he traveled was in good condition and would bear axle loads of 16,000 to 18,000 pounds, and there is no showing as to whether or not such pavement was built with center joint; that by Mr. Teller which was general in character (R. 133) and to the effect that concrete of the thickness of that prevailing in South Carolina would bear 16,000 to 18,000 pound loads with no discussion of the presence or absence of center joint; and the admission by Mr. Williamson (R. 179) that the new roads built on main highways will support axle loads of 18,000 pounds under good conditions. His admission is later qualified, as will be hereafter explained, but it must be admitted that roads built prior to 1930 are not "new roads" and that he could not have been referring then to the pavements without center joint.

As Mr. Older testified that the wheel load on some 60 per cent of the concrete roads, that is, those without center joint, should be limited to 4000 to 4200 pounds, an understanding of such testimony means an axle load of 8000 to 8400 pounds which, when explained as above, means a gross load for a tractor-semitrailer of just a little less than 20,000 pounds which is provided in the statute.

As we previously observed, the Act was passed on the advice of the then State Highway Engineer, Mr. Charles H. Moorefield. He was undoubtedly aware of the condition of the roads and how they had been constructed. He must have known of the large mileage of concrete in existence in 1933 which was without center joint. He must have known of the need of such joint because he had then been building pavements with such joint for a period of about

four years. It is reasonable to assume that he calculated the capacity of such pavement in the same manner as did Mr. Older and that he was aware of the manner in which truck and trailer loads were commonly distributed, and advised such a limitation as a very practical measure to protect the bridges, the weak concrete pavement without center joint, the bituminous pavement and low type surfacing, the city streets and the highways of the State generally, yet to permit such volume of traffic as would move in conventional two-axle trucks to maintain a rear axle load as nearly consistent with the limits in other States as practical local considerations would permit.

From that which is set forth above, it is readily obvious that the Court either misunderstood or disregarded the testimony which was before it in reaching the conclusion that there was "no reasonable difference" of opinion as to the absence of any relationship between the gross load limit and the protection of the roads, and in the observation that there was "even less justification for the requirement that the tractor-semitrailer combination be counted as one unit for that purpose". A legislative enactment need not be scientifically accurate nor mathematically exact. The Legislature was entitled to make the common sense observation that single trucks commonly operate on two axles, front and rear, that the greater portion of the load is commonly balanced over the rear axle, that from two-thirds to four-fifths of the load is commonly carried on such rear axle, that tractor-semitrailer combinations commonly operate on three axles and that the rear axle of a semi-trailer is commonly loaded in about the same manner as the rear axle of its tractor. The Legislature need not spell out the basis of its pronouncements in order to preserve their validity. If the legislative result does substantial justice the manner in which and the basis upon which it achieved that result is immaterial. Highway construction

is not an exact science. Factors for *design* of pavements may or may not be fair or practical factors for their *protection*. The evidence of record and the very nature of the gross weight limitation furnish ample basis for both the conclusion that it is a fair, a necessary and a reasonable measure for highway protection and that there is ample room for, and that there does in fact exist, an actual difference of honest opinion as to its fairness, necessity and reasonableness.

c. The facility of compliance with a gross load limitation justifies it as a valid measure, preferable to a wheel load limit, since it bears a practical relationship to the protection of the pavement. (Assignments of Error Nos. 8, 9, 14, 16, 24.)

As has been pointed out above there does exist a very practical relationship between the gross load limit here considered and the protection of the South Carolina roads. While we contend that the comparative merits of two valid limitations are not questions for the Court to decide and must be left to the exclusive discretion of the Legislature, we further urge that the facility of compliance with a statute as well as the multiple purpose or purposes for which it is enacted must be taken into consideration in determining its reasonableness. Here the Court finds that a gross weight limitation is reasonable with respect to bridges, although it does find that a 20,000 pounds gross weight limit is unreasonable as applied to "modern bridges" (Finding of Fact 25). When the Legislature passed the Act in question it must be borne in mind that it had many problems to consider. It must protect not only the "modern" concrete roads but also the old ones, with or without center joint, the bituminous roads, those covered with low type surfacing, the local roads, the city streets and the bridges, both old and modern. If the Legislature could lay

down a plain simple limitation which was the *result* of the consideration of the capacity of all of these elements its simplicity and the facility with which it might be complied with, as well as efficiency in enforcement, are all elements for legislative consideration and bear upon the reasonableness of the Act.

It must be conceded that a truck operator knows or can easily ascertain the unladen weight of his equipment. With a flat, gross weight limit it is a simple matter to subtract such unladen weight from the limit permitted to determine the amount he may legally haul. Clearly the weight of the cargo must be determined under any kind of a limitation and, with a gross weight limit applicable to all, a truck operator can readily comply with the law.

If the limit is based on wheel weight how can an operator know that his load will not shift after it is loaded, that the wheels on opposite ends of an axle will remain level and thus evenly divide the axle weight, or that in the case of fluid cargo, such as gasoline and the like, the load may not flow to different axles on the up or down grades?

Contrast the simplicity or practicability of the limit here questioned with that which is urged by appellees, W equals 700 (L plus 40), explained as it may be, then visualize the mathematical gymnastics which must be performed by the average truck operator or the average law enforcement officer to determine whether or not he is violating the law, and the good sense of the legislative judgment is immediately apparent.

d. An absolute and independent justification of the South Carolina gross load limitation exists in the varying subgrade conditions found (Assignments of Error Nos. 8, 9, 14, 15, 24).

Professor Tucker testified:

> "It is almost impossible to say what causes a failure of a pavement, especially a concrete pavement, there are so many factors entering into it" (R. 125).

Pavement failure is due to a number of causes including trucks, subgrade conditions and frost (R. 125, 130). Concrete roads constructed in as nearly the same manner as possible will vary in strength in different places. The strength of subgrade and foundation varies in different parts of the State and even in the same territory approximately. Sometimes it varies in very short intervals along the same piece of road (R. 235).

All of the witnesses agreed that subgrade conditions are one of the principal causes of pavement failure. Inasmuch as the record contains very little evidence as to the reasons for the importance of subgrade, what faulty subgrade conditions are, and what effects they cause, we at this time resort to information of which this Court can take judicial notice contained in the aforesaid magazine "Public Roads". No. 3, Volume 10, page 37, May, 1929, contains an article "Interrelationship of Load, Road and Subgrade". The importance of subgrade is shown by the following on page 41 of such article:

> "'Breakage' due to load occurs on account of low subgrade support. This was clearly brought out in surveys by the highway research board and experiments performed at Arlington. According to the Arlington test data summarized in Table 2, the ultimate resistance of slabs (7 feet square) to the occurrence of breaking differs considerably depending upon whether they are laid on a drained or an undrained subgrade."

Table 2.—Average load capacities of nonreinforced concrete slabs 7 feet square, when laid on clay subgrades drained and undrained. (Impacts applied at corner and edges of slabs, Arlington tests.)

Slab thickness, inches	Mix	Breaking loads [1]	
		Wet subgrade	Drained subgrade
		Pounds	Pounds
4	1:1½:3	([2])	13,650
6	1:1½:3	12,825	[3] 20,000
[4] 6	1:1½:3	10,675	22,225
8	1:1½:3	25,900	42,040
[4] 8	1:1½:3	25,475	38,800
[4] 6	1:3:6	([5])	18,430
6	1:3:6	9,580	[3] 18,300

[1] Unless otherwise noted each value is the average of two tests, one with the load applied at the edge and the other with the load applied at the corner of the slab.

[2] Broke under static load varying between 2,000 and 8,000 pounds.

[3] One edge test.

[4] Covered with bituminous tops.

[5] Six out of eight slabs tested broke under static loads varying between 2,000 and 8,000 pounds, the other two tests, both for edge loading, averaged 10,105 pounds."

The complexity of the problem is shown by the following from page 45:

> "Thus, according to the preceding discussions, pavement behavior may depend upon the character of the subgrade soil material (raw constituents), upon the structure of the soil in its natural state (dense or loose, homogeneous or full of cracks or root holes), upon the soil profile (variation in depth of the different soil zones and the relative occurence of permeable and impermeable strata) upon adjacent topography (through its influence upon the occurrence of surface and un-

derground water), upon climatic conditions (well distributed or intermittent occurrence of rainfall and presence or absence of frost action), or upon any combination of these variables."

A discussion of some of the soils of South Carolina appears at page 48:

"GROUP A-5, SOILS CHARACTERIZED BY POROSITY, DEFORMATION, AND REBOUND.

Similar to those of Group A-4, these subgrades also consist primarily of very fine sands or silts. But in addition, they contain an appreciable percentage of micaceous particles or diatoms, which cause the subgrades of this group to be highly porous, to deform quickly under load and to rebound appreciably upon removal of load." * * *

"The highly micaceous soils occur very frequently in Pennsylvania, Maryland, and North and South Carolina and other states."

A further description of subsoils encountered in South Carolina is contained in Volume 17, No. 11, page 249, January, 1937, of "Public Roads". This article is entitled "Experimental Bituminous Treatment of Sandy Soil Roads" and has to do entirely with South Carolina. With reference to certain South Carolina soils it is stated on page 249:

"A wide variety of bituminous materials and aggregates have been used successfully for such work, and while different types of surfaces have resulted, there has been no special difficulty in providing a satisfactory surface for roads whose bases and subgrades were capable of supporting traffic.

"For those localities where the roads were composed of loosely bound soil, such as sand or mixtures of sand, silt, and clay that were inherently weak, the problem of improvement was more difficult. Such a condition is found in the South Atlantic coastal area in general, and the eastern part of South Carolina in particular.

"An appreciable mileage of the roads in this territory traverses relatively low, swampy areas that offer little opportunity for adequate drainage of the right-of-way because the ground-water level in many places is approximately at the elevation of the ground surface."

And on page 260:

"The most important factor contributing to roughness during most of the life of the road has been the sub-grade, which is extremely variable in composition and, in some locations, is very poorly drained. Settlement occurred in some areas that had appeared stable prior to constructing the bituminous mats. Investigation disclosed that the subgrade in such areas was extremely wet and plastic while material less than a foot outside of the bituminous mat was firm and relatively dry. The mat apparently prevented surface evaporation and permitted the subgrade to acquire and retain sufficient moisture to destroy its stability. Obviously, the composition could not be changed after construction but considerable effort has been expended to provide artificial drainage. The ground-water level in many cases is so high that the maximum benefit derived by the construction of side ditches is to provide a relatively shallow depth on drained base which, because of its composition, is variable in load supporting capacity."

And on page 261:

"As in the case of experiment 1, subgrade and drainage conditions in this experimental section were exceedingly variable. Each section had sandy areas, areas high in clay content, poorly drained areas, and areas fairly well drained."

A further discussion of subgrade, entitled "The Soil Profile and the Subgrade Survey", appears in the September, 1931, issue of Public Roads, Vol. 12, No. 7, p. 181. At pp. 183-184 the following appears:

"The characteristics of a soil and its value as a subgrade under different conditions are directly reflected in the condition of the road surface. Rigid pavements are affected by inequalities of subgrade support. Nonrigid pavements are chiefly affected by low road supporting power. Studies have shown that the subgrade soil exerts important influence upon the distance between transverse cracks in concrete roads, and that excessive longitudinal cracking develops on definite layers of certain soil types. Other soil characteristics, such as swelling, affinity for water, rebound, etc., are detrimental to concrete before it sets as it is then flexible pavement."

Faulty subgrade conditions not only result in breaking of the pavement slabs on the application of truck loads, but also cause a sinking away of the subgrade underneath the pavement, resulting in a subsiding of the pavement. To fill in subgrade that has subsided, or to strengthen such subgrade, and thereby bring the pavement back to grade, resort is had to the operation known as "mud jacking". Some explanation is given of this in Volume 14, No. 10, page 188, December, 1933, issue of Public Roads, entitled "Laboratory Tests Assist in the Selection of Materials Suitable for Use in Mud Jacking Operations". To carry on this operation a hole is bored through the pavement and a suitable material is pumped through this hole. The following quotations show the nature of the operation as fully as shown in the article:

"A satisfactory mixture of soil, portland cement, and water for use in raising settled areas of road surfaces by mud jacking (see fig. 1) must be of such a character that it can be readily forced through the mud jack. It must possess qualities which will enable it to spread freely over the subgrade as the separation between the road surface and subgrade increases during the pumping operation, and it must prevent appreciа-

ble settlement of the raised area of pavement after the pumping operation. • • •

"In passing through the pump and hose the mixture is confined to a definite channel of comparatively large size and only the proper combination of pump pressure and fluidity of mixture are required. When the paste reaches the subgrade, however, its flow is not restricted to any particular cross section. It is free to form in layers whose ratios of thickness to area of distribution depend to a very considerable extent on the frictional resistance of the subgrade and the under face of the road slab which bound the shallow openings penetrated by the paste. • • •

"Raised areas of pavement may settle after the pumping ceases as a result of several causes. The weight of the pavement may cause the viscous paste to flow out as soon as the pump stops or the paste may shrink on loss of moisture. The paste or soil mixture must be stable enough to support the pavement and loads produced by traffic immediately after pumping ceases and must resist shrinking upon loss of moisture."

The subjects of subgrade and mud jacking are discussed in *Werner Transportation Co.* v. *Hughes* (D. C. N. D. Ill.) 19 Fed. Supp. 425 at 428, 429, as follows:

"Because of the presence of varied types of soil in Illinois, there is a variance in the supporting power of the subgrade during the seasons of the year. In the case of embankment materials, it is difficult to place them in a state of compaction which is uniform in its supporting power and will prevent settlement of the pavement slab. When the frost leaves the ground, many soils have little supporting power and many change greatly in volume with the addition of a relatively small amount of precipitation. During the periods of freezing weather many soils expand greatly, due to presence of water, and lift the pavement from the subgrade, introducing roughness into the surface,

resulting in impact stresses under heavy loads, producing pavement destruction. Daily changes in temperature cause the pavement slab to warp, or curl, thus leaving that particular portion of the slab without subgrade support, so that when a vehicle passes across such portion of a slab, the slab must act as a beam to carry the load back to the point where there is support. * * *

"Subgrade conditions are frequently unstable on fills back of bridge abutments and at other locations. Depressions in the subgrade are usually caused by the action of moisture upon unstable soil and a variety of other causes. *Where a weakened subgrade condition exists the pavement slab performs to some extent the functions of a bridge, in which case the total or gross weight imposed upon the slab determines the stress induced upon the material constituting the slab.* (Italics supplied.) If the stress produced by such total weight is in excess of the ultimate strength of the material, rupture will occur and the slab will settle into the affected area. Because of the settlement of slabs, it is necessary to raise them by what is called a mud pumping outfit. Since the year 1931, there has been in Illinois a total of 12,050 depressions so raised, covering a total area of 1,082,775 square yards. However, in numerous locations where such settlements have occurred, the pavements have been so badly broken that they had to be entirely rebuilt."

The relation of all of the foregoing to the subject of the validity of a gross load limitation is plain. It is stated in the above quotation from the Werner Transportation Co. case, "When a weakened subgrade condition exists the pavement slab performs the function of a bridge." This may be reasonably deduced from the evidence in the record. The slab spreads the weight of the vehicle over the subgrade (R. 136). It is the subgrade which supports the load. It is the function of the surfacing merely to act as a roof over the

subgrade and to spread the load over such subgrade (R. 160). Where the subgrade is weak, where the material has become soft and has absorbed water under the slab, or where there has been actual falling away or shrinkage of the subgrade under the slab, it is obvious that the supporting power of the slab must be extended over a much wider area than under good subgrade conditions. The extent of this area appears from the above excerpt from the Werner Transportation Co. case. 12,050 depressions were raised, covering a total area of 1,082,775 square yards. Assuming a pavement width of 18 feet, it will be seen that the average length of such depressions was about 45 feet. At some time during the development of the weak place in the subgrade, perhaps before the pavement has commenced to sink, the subgrade was sufficiently weak under an area of the average length of 45 feet so that the slab over that weakened area performed the functions of a bridge over that area. Thus the gross weight of the vehicle imposed upon the slab over such area becomes the critical factor in the strain imposed upon the slab. That this is a serious condition quantitatively is evidenced by the 12,050 depressions found in Illinois in less than six years.

The District Court found (Finding of Fact 25) (R. 83) that gross weight is of importance in connection with the use of bridges. It is a well known scientific fact, of which the Court may take judicial notice, that when a beam is supported at each of its ends without support between them, both the *aggregate* load and the proportionate distance from the respective ends at which such load or loads is applied are critical factors in determining the amount of weight such beam will bear before it breaks. From all of the above it may be seen that the rigid concrete pavements in South Carolina form not only a ribbon of smooth traveling surface over the natural ground but also a series of virtual bridges covering the numerous places in the subgrade of varying

size where the supporting power of such subgrade, because of conditions described above, has been lessened or has vanished. The foregoing discussion explains the statement of the witness Williamson to the effect that "some concrete pavement in one section may hold up 100,000 pounds. The same identical pavement, as far as construction goes, may break up under a two or three thousand pound load" (R. 160).

It takes no scientific research to understand these plain, simple principles. As the Court well knows the discourse of scientists often tends to obscure rather than explain the ordinary scientific facts known to the average man. There was probably not in existence any better knowledge of the soil, subgrade, and climatic conditions in South Carolina than the collective knowledge of the Legislature. The members of the Legislature, not pretending to be scientists, were probably well aware of the principles here discussed. That there exists ample justification for the 20,000 pounds *gross load* limitation *as a means of protecting concrete pavement*, regardless of the number of axles supporting it, seems absolutely clear. In the face of these well known principles no group of engineers, and much less the Court, can say that the Legislature was wrong in fixing its gross load limit, that its action in so doing was clearly arbitrary or capricious and that there exists no debatable question as to the necessity for or reasonableness of such limitation.

e. The provision in Section 2 that a tractor-semitrailer combination shall be considered as one vehicle for the purpose of the 20,000 pounds gross weight limitation, is valid (Assignments of Error No. 6, 24).

The District Court found (Finding of Fact No. 6, R. 77) that the provisions of Section 2 providing that a tractor semitrailer combination shall be considered as one unit for the purpose of the twenty thousand pounds weight limita-

tion is unreasonable. It made these findings in connection with its findings that the twenty thousand pounds gross weight limitation as to one vehicle is unreasonable.

The gross weight limitation being valid, as explained above, it is plain that these provisions of Section 2 are not only valid but necessary in order to effectuate the twenty thousand pounds gross weight limitation. The same reasons which make the gross weight limitation valid as to an ordinary truck apply to a tractor semitrailer combination because the latter has precisely the same effect, as far as gross weight is concerned, as the ordinary truck, and presents the same gross weight problem.

Thus the Court erred in its Findings of Fact Nos. 20, and 26 (R. 82, 84) and in paragraph one of its decree in enjoining enforcement of that part of the law providing that a tractor semi-trailer combination shall be considered as a single unit for the purpose of determining weight.

The finding expressed in Finding No. 20 that the effect of a tractor semi-trailer combination is not different from the effect produced by two vehicles of equal weight, one following the other, is per se fallacious. It is obvious that the intent of this provision is to prevent more than twenty thousand pounds gross weight being imposed upon highways and bridges within a limit of 35 feet, this being the maximum length permitted such combination. Section 7, Act. 259, (Appendix I, p. 148). Common experience proves that two twenty thousand pound vehicles will not follow each other within that distance. The law of South Carolina prohibits heavily loaded vehicles following each other closer than 150 feet.

Acts of South Carolina of 1937, Act 175, Section 12, page 227, provides as follows:

> "b.-The driver of any motor truck or motor truck drawing another vehicle when driven upon a roadway outside of business or residence district, shall not follow within 150 feet of another motor truck or motor truck

drawing another vehicle, and the driver of any motor truck traveling in convoy of two or more such motor trucks shall not follow within 500 feet of any other motor truck in said convoy."

f. The Width Limitation of ninety inches is valid (Assignments of Error Nos. 10, 11, 24).

The District Court found (Findings of Fact Nos. 24 and 26, R. 83, 84) that the width limitation of ninety inches is unreasonable; and in its decree the Court enjoined the enforcement of this width limitation provided the vehicles taking advantage of such injunctive protection do not exceed ninety-six inches in width.

In effect the Court holds the width limitation invalid on the highways covered by its decree, but writes a new act limiting the width under any circumstances to ninety-six inches. The legislative character of such action will be discussed in our point IV. However, we submit that there is not one scintilla of *competent* evidence to support the Court's finding in this respect, that the proper evidence forces an opposite conclusion, that the limitation shows on its face that it is of such character as to be free from judicial interference, and that the Court by its own findings and the terms of its own order convicts itself of its own error.

The only testimony submitted by appellees bearing on the effect of the width limitation was wholly irrelevant for the purpose of showing such limitation unreasonable. They offered much as to inconvenience and added expense to shippers and those engaged in performing interstate transportation service by truck, as to the width limitations which prevail in other States and the percentage of some classes of trucks which are ninety-six inches wide. We submit that under established law, all of such testimony was irrelevant as proof of unreasonableness in the sense in which it is here involved. *Morris* v. *Duby, supra,* 274 U. S. 135, *Sproles* v.

Binford, supra, 286 U. S. 374, and *N. Y., N. H. & H. R. Co.* v. *New York, supra,* 165 U. S. 628, are all authority for the proposition that in the absence of Federal legislation specifically covering the subject and in view of the fact that the regulations covering the subject are within the power of the State, inconveniences to interstate commerce and those engaged in it are immaterial. We submit that under the authority of the same cases last above mentioned the width limitation shows on its face that it is such as to be within the exclusive realm of legislative authority. In addition to this consideration there is ample evidence in the record to support the legislative conclusion. Appellants showed that there are many narrow bridges in the State (R. 187), that there are several 18 feet wide and one fifteen feet wide, that wider vehicles increase traffic on the unpaved shoulders which in turn increases maintenance cost (R. 198, 236), that there are over one hundred miles of pavement in the State system only sixteen feet wide, that most of it is eighteen feet wide, that there is some twenty feet wide and that there is one little stretch in Sumter County only nine feet wide (R. 177, 197), that wide vehicles compel more travel on the edges of the road where traffic is more destructive except in the case of concrete which has been thickened at the edges (R. 236) and that it is easier for the driver of an approaching vehicle to see beyond a vehicle which it is overtaking if the preceding vehicle is narrower, that the angle of vision is cut off in proportion to the width of the vehicle ahead and that "six inches difference (in the width of a truck) would make a great difference" (R. 242).

All this testimony is clearly proper and relevant to show that a width limitation is in fact a measure to promote safety in highway traffic, to preserve the highways and bridges and to support the reasonableness of the legislative judgment. The mere fact that laws of other States may

provide otherwise is wholly immaterial. In *Sproles* v. *Binford, supra* (286 U. S. 374), the Court said:

> " * * * one state can not establish standards which would derogate from the equal power of other states to make regulations of their own."

There are so many obvious circumstances which would affect the reasonableness of a width limitation that comparison with other States is not even persuasive. Such differences include not only difference in pavement widths, but also width of right-of-way, differences in highway alignment and curvature, in grades and even differences in density and kinds of traffic.

The final consideration which should nullify the decree in this respect is the Court's own action. By the limiting of the protection of the injunction to vehicles of such widths as do not exceed ninety-six inches, the Court, by its own action, admits the propriety of and necessity for a width limitation. *It merely disagrees with the judgment of the Legislature and substitutes its own judgment therefor. For a difference of six inches in width limits it presumes to invade the exclusive realm of legislative discretion.* In *Sproles* v. *Binford, (supra)* 286 U. S. 374, at page 388, the Court said:

> "Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the 14th Amendment was intended to secure."

In its Finding of Fact No. 24, the Court assigned three reasons for its conclusion that the width limit is unreasonable, (1) that all other States permit ninety-six inches, (2) that ninety-six inches is the standard width of trucks engaged in interstate commerce and (3) that enforcement of

the limitation would exclude "a large portion of the equipment" used in interstate commerce without material advantage to the safety or preservation of the highways. We submit that the width of the paved or travelled surface of the highways is the basic, physical reason for the existence of a width limit on vehicles which use them. That a width limit of ninety inches is *per se* reasonable for vehicles travelling on the 100 miles of roads in the State system which are not more than sixteen feet wide is a matter that admits of no argument. Where those 100 miles are situated is not shown nor whether or not they are so placed as to be "important" and their relative importance are manifestly questions for the Legislature. The relative necessity for a ninety inch as against a ninety-six inch limit on pavements eighteen feet and twenty feet wide is clearly a question for the Legislature. Since whether or not the enforcement of the width limitation would result in material advantage to the safety or the preservation of the highways is a question for legislative determination, and since the width limits in other States, the standard width of trucks engaged in interstate commerce, and the exclusion of a large portion of the equipment used in interstate commerce, are all considerations which are immaterial and can not operate to inhibit the State's fundamental power, the finding by the Court that the width limit of ninety inches is unreasonable was plainly erroneous and should be reversed.

2. *The decree was based upon the premise that there is a well connected system of concrete roads in South Carolina and the record does not show that such well connected system exists.* (Assignments of Error Nos. 4, 5, 24).

The theory of the appellees' case and upon which the lower Court entered the decree rests upon Finding of Fact No. 18 (R. 81):

"That the said standard paved roads form a well connected system of highways which have been improved with federal funds as a part of a national system; * * * that they are capable of carrying the commerce which has been developed by modern truck transportation; that federal highways numbered 1, 15-A, 17, 21, 25, 29 and 52 comprise the great arteries of interstate commerce through the State of South Carolina, are of standard concrete paving, as above described, with the exception of a few short stretches, a few miles in length which are not of sufficient importance to justify the denial of the use of these arteries of commerce for the purpose for which they were constructed."

It is the position of the appellants that even if such system did exist and that even if the roads in such system could withstand all of the loads described by the lower Court, the statute is nevertheless reasonable because of its necessity for the protection of all the other 57,000 miles of highway in the State and because of the valid application of the law to all of the roads as an entity, which position will be fully explained at our subdivision 3 of this point. However, it is clear that appellees' case and the Court's findings and decree rest upon the premise that the roads enumerated above form a well connected system of concrete roads in the State, that interstate commerce by truck is carried on over such system, and that the statute is unreasonable because it interferes with part of the *truck* traffic over such system. If this premise fails then appellees' case and the findings and decree fail.

Without in any way admitting that the Court's reasoning is correct (for we contend to the contrary), we nevertheless submit that the said 18th Finding is erroneous because entirely unsupported by the record and that the record in fact shows the converse. The burden of proof to show the unreasonableness of the South Carolina laws rested

upon the appellees. If the issue of whether there is such a system of well connected highways is material, appellees had to show its existence to make their case. *Keokee Consolidated Coke Co.* v. *Taylor*, 234 U. S. 224; *Williams* v. *Baltimore*, 289 U. S. 36; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Pullman Co.* v. *Knott*, 235 U. S. 23.

This they did not do, and the evidence shows the contrary. The following is all of the evidence on this point:

Harry Tucker, Professor of Highway Engineering at the North Carolina State College and Director of the North Carolina Experimental Station at Raleigh, testified for appellees (R. 124). Everything he had to say as to the strength of highways related to plain concrete roads. His actual examination of South Carolina roads was confined to those covered in a trip taken by him and described at R. 126. The roads apparently covered by him, acccording to his testimony, are shown on Appendix VII on page 161 of this brief. He did not testify that the roads over which he traveled are entirely of concrete, and the fact is that there are numerous stretches of low type road interspersed with the concrete portions. This is evident from an examination of the appellees' Exhibit No. 6 (R. 300) and will be more fully shown later herein. Nowhere in the testimony of this witness is there any evidence even attempting to show a well connected system of concrete roads, or in fact of just what type of roads the highway system consists.

Intervener, Interstate Commerce Commission, intervening as a party plaintiff (R. 42, 50) produced as a witness on its behalf L. W. Teller (R. 130). There was no attempt made to show by Mr. Teller's testimony the existence or extent of a system of concrete roads in the state. His testimony material at this point is the following:

> "I do not know what portion of the roads of this state are concrete roads. I do know that some of the

roads within the State Highway System are what they call bituminous surfacing, because I saw some of them Sunday. So far as I know the weight that can be permitted on pavement of the bituminous type cannot be determined analytically or by tests. I do not know as to what weight should be permitted on them. I do not know as to the dirt type of roads within the State Highway System or anything about their designing or what weights they could properly bear; and, of course, I do not know anything about the mileage of these roads. I am not acquainted with the design of the bridges throughout the State Highway System of South Carolina.

(Asked to give his opinion as to what load the roads in South Carolina should bear, speaking of all the roads in the State Highway System:)

"I don't believe that there is anyone that could go over the roads of any State Highway System and say that this road is good for so much, and this road is good for so much and the other road is good for so much. The concrete pavement is the only pavement that we have a means for rational design. The design of the other types must be based on the observation of pavements of that type, under the conditions in which they have to serve under the traffic they are bearing, in my opinion" (R. 134).

"Well, we are talking about interurban roads, and interurban roads are not to any extent at all, so far as I know, built of anything but straight concrete pavement, where the rigid type is concerned. We find a few short sections of concrete bases with brick tops in some states. We find a few short sections of concrete bases, with bituminous top in some states, but by and large the rigid pavement as concerning interurban traffic is the concrete pavement" (R. 136).

The foregoing testimony of witnesses Harry Tucker and L. W. Teller plus appellees' Exhibit No. 6 (R. 300) constitute all of appellees' evidence on the issue as to the existence of a well connected system of concrete roads in

South Carolina. Obviously, the testimony of the two witnesses affords no light on the subject, and Exhibit 6, upon examination as we shall hereinafter show, definitely establishes the nonexistence of such a system.

For the appellants, J. S. Williamson, Chief Engineer of the South Carolina Highway Commission in effect testified: There are 60,000 miles of road in the state and about 6,100 in the State Highway System. The other road mileage is under the supervision of county and city authorities. There are in the state system 2,417 miles of standard pavement, 1,724 miles of bituminous surface, 1,141 miles of earth type and 666 miles of unimproved. Of this 2,417 miles of standard type of pavement, there are 1,800 to 2,000 miles of pavement entirely of concrete, and the rest includes asphalt surface with concrete base and asphalt surface with asphalt base (R. 159). The bituminous surface road is made by building an earth type base of some local material and covering it with asphalt as a wearing surface about 3/4 of an inch thick. Such roads are primarily designed for automobile traffic and are not well adapted to heavy loads. They can be constructed at a much cheaper price than concrete pavement. Due to the lack of funds and the demand from the public for surfaced roads, we have had to take what funds we had and spread it over a large mileage, and that is about the only way we could get all-weather roads. These bituminous surface roads comprise about one-third of the surfaced mileage in the State Highway System. Wherever there has been heavy traffic on these bituminous surface roads they have not held up (R. 161-163). There is bituminous surfacing of this kind or other like surface treatment of some kind on practically every road throughout the State. Where there has been heavy truck traffic on bituminous surfaced roads, such traffic immediately caused failures and ruts developed in the surfacing. The wheels of the trucks would sink in and the shoulders were pushed

up. The witness then retraced a part of the route followed by the witness Harry Tucker, pointing out a number of weak bridges and the stretches of bituminous surface on that route and then stated that weak bridges and bituminous surfacing are scattered throughout the State, that on some roads there are more weak places than on others. Also there are stretches of unpaved dirt roads scattered throughout the State Highway System. The dirt roads cannot carry heavy loads (R. 169-170-171). There are about fifty miles of bridge work in the State Highway System and about seventy-five per cent of that mileage has been designed to carry a load not in excess of ten tons (R. 174).

The foregoing testimony of the appellees' witnesses and the appellants' witness comprises the entire testimony as to the extent and continuity of a system of concrete highways. The only other evidence on this point is appellees' Exhibit No. 6 which is in two sheets (R. 300). These two sheets purport to show the Federal Aid Highway System in South Carolina corrected to May 1, 1936, and are published by the Bureau of Public Roads of the Department of Agriculture (R. 137, 198). Their printed legend evidences that they show the Federal Aid Highway system, the portions of such system improved with Federal aid, the portions otherwise improved, the portions of the system under construction, and the types of surfacing of the roads. They show all of the roads described in the decree. An examination of this official map, which is appellees' exhibit, clearly shows that there is no connected and continuous system of concrete highways in South Carolina. Every highway mentioned in the court's decree, and every highway shown on Exhibit 6, has substantially long stretches of bituminous surfacing, macadam, sand-clay, gravel or earth roads. The mileage of the various types of surfacing are shown, by our measurement from this map, in the following table:

Route	Concrete surfacing	Bituminous surfacing	Macadam surfacing	Sand-clay surfacing	Earth surfacing	Not specified	Total
No. 1							
Miles	83.0	71.0	10.2	....	....	....	164.2
%	50.5	43.3	6.2	....	....	....	100.0
No. 15 (Note 1)							
Miles	102.0	17.4	11.0	....	5.5	7.5	145.4
%	70.2	12.0	7.5	....	3.8	6.5	100.0
No. 17							
Miles	133.0	32.4	19.8	....	....	32.4	217.6
%	61.1	14.9	9.1	....	....	14.9	100.0
No. 21							
Miles	150.0	27.6	17.3	17.3	3.2	....	215.4
%	69.7	12.8	8.0	8.0	1.5	....	100.0
No. 25							
Miles	126.0	7.9	0.8	....	....	....	134.7
%	93.5	5.9	0.6	....	....	....	100.0
No. 29							
Miles	88.5	15.0	....	....	....	....	103.5
%	85.6	14.4	....	....	....	....	100.0
No. 52							
Miles	94.0	38.6	11.8	7.9	1.6	....	153.9
%	61.1	25.1	7.7	5.1	1.0	....	100.0
Total							
Miles	776.5	209.9	70.9	25.2	10.3	41.9	1,134.7
%	68.5	18.5	6.2	2.2	0.9	3.7	100.0

NOTE 1.—The decree names as one of the highways "15–A". No highway so designated is shown on the maps in evidence, but No. 15 is. The mileage for 15 is, therefore, included in the above table.

In the map legend, surfaces of bituminous materials are not differentiated to show which are bituminous top on gravel, macadam and similar bases, and which are bituminous concrete, that is, bituminous top with concrete base. The bituminous surfacing shown in the map exhibit 6 therefore includes both. Williamson testified (R. 163) when speaking of low type bituminous surfacing, that there were some sections of that type pavement on practically every road in the State. As shown by the above tabulation, highway No. 29 has only 15 miles or 14.4 per cent of its surfacing of materials other than concrete. It is reasonable to conclude that some if not all of this 15 miles are covered with the low type surfacing referred to. Since the burden is on appellees, and since the bituminous surfacing is not shown to be bituminous concrete, we can not assume that any of the 209.9 miles shown in such column is bituminous concrete. The record clearly shows that only 40 per cent

of the State system, considered as a whole, is surfaced with concrete and bituminous concrete. Surely the State system, taken as a whole, can not be considered to constitute a connected system of concrete roads.

The specifically designated routes are therefore presumably the best in the State and are those which form the so-called well connected system to which the court referred. From this it may be seen that only 68.5 per cent of that mileage or about two-thirds of it are proven by the record to be of concrete of the type which forms the basis of the decree. Not a single one of such roads is proven to be all of concrete and, even if the bituminous surfacing could be assumed to be all bituminous concrete, of which there is no proof, there remains thirteen per cent of the total mileage which the court finds is incapable of supporting the loads permitted by the decree.

It is submitted that the foregoing evidence does not sustain Finding of Fact No. 18 (R. 81) or paragraph one of the decree (R. 85) which, based on such finding, enjoined enforcement of the law upon certain highways comprising the "great arteries of commerce through the state of South Carolina" because such highways "are of standard concrete paving as above described with the exception of a few short stretches a few miles in length which are not of sufficient importance to justify the denial of the use of these arteries of commerce for the use for which they were constructed."

We further submit that the court's finding that there are only a few short stretches of pavement other than concrete, which are a few miles in length, which are not of *sufficient importance* to justify the denial of the use of such roads for the purpose for which they were constructed (Finding of Fact 18), is wholly unjustified, on the record before it. Furthermore, it is not a finding of pure fact but a conclusion. We submit on authority of cases heretofore cited that whether or not gaps in a stretch of concrete road are of suf-

ficient length to be important or unimportant is wholly a question for the exclusive determination of the Legislature.

The record shows that concrete pavement costs from $30,000 to $35,000 per mile (R. 174). There are about 358 miles in the definite segment not shown to be concrete and which might necessarily require concrete construction. At the above figures such construction would cost in excess of ten millions of dollars. The Legislature had a perfect right to consider whether or not the State could afford such an expenditure or whether it preferred to pave other roads in the State before those in such segment. The record shows that traffic over roads other than concrete or bituminous concrete will destroy the road and the court finds the limits reasonable as to such other types of pavement. The mere fact that the enforcement of the law has been enjoined since its inception without visible signs of pavement failure is no proof as to the volume of heavy trucks which operated contrary to the terms of the Act nor that the damage has not been done without it being presently apparent. For through traffic a road is no better than all of its parts. If gaps or portions of a highway are impassable, through traffic on the entire route is frequently impossible. All these and many others were proper subjects for legislative determination alone, and the court was clearly wrong in either finding that an interconnected system of highways exists or that the portions of the named roads not paved with concrete were unimportant. Since the decree was based on the capacity of a presumed interconnected system of concrete roads, which system is not shown to exist, this furnishes another reason for the reversal of the decree. Considered alone this reason is sufficient. Added to other reasons here shown it becomes even more compelling.

3. *The statute is reasonable and necessary as a means of protecting all of the highways and bridges in the State and as a means of promoting safety in their use and the court erred in holding it unreasonable because it had concluded that it was unreasonable as applied to vehicles on a limited portion of the State's highways* (Assignments of Error Nos. 4, 5, 24, 28, 29).

The court held in its second conclusion of law and by paragraph (3) of its decree that the statute is reasonable as to all of the 60,000 miles of highways in the State except those described in paragraph (1) of the decree (R. 84, 85, 86). It then proceeds to separately consider the relationship between the limitations and the limited mileage last above mentioned, to conclude such limitations are unreasonable on such limited mileage, and to enjoin the enforcement of the Act in so far as operations over such mileage are concerned, provided vehicles operated there do not exceed 96 inches in width.

In this respect it is our contention that the decree and action of the court is fatally defective in two different respects, and that in its finding of reasonableness as to all but such limited mileage the court convicts itself of its own error. Such defects are: (a) That in enacting and administering regulations pertaining to the use of public highways a State may treat all of its roads and streets as a whole, and that in testing this reasonableness of legislative action in such cases the entire highway system, as a single entity, must be considered, and that the fact that such limitations might be unreasonable as applied to a limited portion of the total mileage (which we do not concede in this case) is not enough to justify the conclusion that the statute is unreasonable and, hence, invalid, either in its application to all of the roads, or in its application to a limited portion of the same, and; (b) That the court is without

power to arbitrarily (and indefinitely) classify the public highways of the State and sustain a statute, Statewide in its terms, as it applied to part of the roads and enjoin its enforcement as to the remainder, for to do so constitutes a clear case of improper judicial legislation.

Our position as to the absence of *power* in the court to so segregate, classify and separately treat the highways of the State, resulting in the invalidity of the decree *as a matter of law,* will be argued under our Point IV of this brief. Our purpose, at this point, is to show that, since the statute was Statewide in its application, in the light of all the circumstances shown of record and of which the court may take judicial notice, the statute is reasonable *as a matter of fact,* and that the court erred in failing to reach that conclusion.

We submit that in this respect there are at least two broad factual considerations, either of which is sufficient to sustain the conclusion of reasonableness. We contend, first, that the Statewide application of the statute to all highways in the State, without exception, was reasonable and necessary to protect the 57,000 miles of roads in the State not surfaced with concrete or bituminous concrete, and, second, that its Statewide application without exception was reasonable and necessary to protect the thirty-seven and one-half miles of bridges in the State system, constituting seventy-five per cent of such bridges, which were not built to sustain a gross load of more than 20,000 pounds, plus the unnumbered other bridges in the remaining miles of public highways in the State, not part of the State system. We contend in both the above instances the statute was reasonable and necessary not only as a means of protecting the State's property but also as a safety measure.

The decree enjoins the enforcement of the Act as to certain roads described therein, and as to "such portions of

other Federal aid highways as may be of standard concrete or concrete and asphalt construction'' (R. 84, 85, 86).

Incidentally, we observe that there is nothing in the record to clearly define ''*Standard* concrete or *standard* concrete and asphalt construction''. The adjective ''standard'' was indiscriminately used by witnesses for both parties before the lower court, but the record shows that some concrete is seven and one-half inches thick at the sides and six inches thick at the center and that other concrete is eight inches thick at the sides and six and one-half inches thick at the center. Whether or not there is concrete of other dimensions does not appear. If all concrete was intended the term ''standard'' was unnecessary and serves no purpose but to confuse. If it had some meaning it should have been defined. We further submit that there is no practical means for one operating a truck to distinguish between bituminous concrete and bituminous roads without such concrete base. To one driving over the highways the kind of materials beneath the surface can not be readily determined. Had the Legislature been guilty of such slipshod draftsmanship the lower court itself would probably have enjoined its pronouncement under the rule in *Smith* v. *Cahoon*, 283 U. S. 553.

The record shows that all public highways in the State are interconnected and that a vehicle operating on one road, without encountering any physical barrier, may be driven over and upon any public road in the State.

That such vehicles actually are driven over all roads affirmatively appears in the record. Fertilizer *must* be delivered by heavy trucks right to the ''farmer's cotton row or tobacco row'' (R. 199). Net loads of 20,000 pounds of melons are loaded right on the farm (R. 153). Vegetable trucks weighing more than 20,000 pounds pick up full loads on the farm (R. 108, 152). Household goods are moved by van load greatly exceeding 20,000 pounds weight and are

delivered to destination anywhere in the State (R. 145). The witness Williamson testified regarding roads which bear traffic of heavy trucks: "All of them are subject to some. There are trucks on practically every road in the State, it has been my observation. There are some trucks on every road, every station that I come to" (R. 163). Obviously these operations take the trucks off the concrete highways specified in the decree to the rural roads and city streets.

The record also clearly shows that such highways are of all kinds of construction (R. 126, 159). The record also shows that different kinds of soil in the subgrade vary in their supporting power and result in different strength or capacity of the surfacing which covers them (R. 160), that such subgrade conditions make such a great difference in the supporting power that "some concrete pavement in one section may hold up 100,000 pounds", but that "the same identical pavement, as far as construction goes, may break up under a two or three thousand pound load" (R. 160). The record also shows a great variety of subgrade conditions in South Carolina (R. 179).

With reference to bridges the record shows that there are about fifty miles of bridge work in the State Highway System alone and that of these bridges about 75 per cent have not been designed to carry a load in excess of ten tons, the amount provided in the statute (R. 174). This testimony is not controverted.

It is common knowledge that weak and insufficient bridges are numerous and common on public highways in South Carolina and elsewhere. An interesting description of that situation and its effect is found in articles appearing in the September 1936 issue of "Scientific American", entitled "Horse and Buggy Bridges" at page 138 and in the September 1936 issue of "Readers Digest", entitled "Forgotten Bridges" at page 53.

The Court found, (Finding of Fact 25), and there was evidence to support it, that a gross weight limitation is of importance, and by that we presume proper, in connection with the use of bridges, although it disagreed with the Legislature as to the amount of the gross weight limitation as applied to "modern bridges". Appellees did not appeal from such finding. The Court found (Finding of Fact 26), and the evidence supports it, that the assailed limitations are not unreasonable as applied to all but the definite and indefinite segments of roads mentioned in the decree, thereby concluding them to be reasonable as to some 57,000 miles of public highways which remained both within and without the State system. From this finding the appellees did not appeal.

By such finding the Court identified the statute. It found the legislative action to be within the *power* of the Legislature, that there was a sufficient relationship between the statute, as the means, and the end which was within the legislative power, as to result in the statute's validity. We submit that by such action the Court did enough to hold the statute valid in its entirety, and that its own finding in this respect, is the proof of the invalidity of its act in holding the statute invalid as it applied to part of the roads.

Bearing all these uncontroverted facts in mind, it is submitted that the Legislature had the absolute right to consider and to judge all of the practical problems involved in the enactment and application of the statute in question. There are readily obvious problems of administration if the roads are to be classified and different weight and size vehicles permitted on different roads. How many classes should be made for the different types of roadway and different types of vehicles? What weather, seasonal and traffic conditions should influence the permitted weights? What will happen to detour roads while gaps in a strong system are being built? Can heavy vehicles be practically confined

to a limited mileage of stronger roads? Will congestion result on these so-called arteries while loads are being transferred from large to small vehicles? How can the law be enforced? How many patrolmen would be required and what would it cost? Will the mere posting of a sign on a weak bridge prevent the driver of a truck from passing over it? If the admonitions of the sign are disregarded what would be the result to the bridge and would the safety of others be endangered by such disregard? Would officers have to be stationed at such bridges to enforce the limitations and, if so, what would it cost? If heavy loads are to be permitted on the approaches to a bridge but prohibited on the bridge, as is provided in the decree, must an officer stationed there stand like Horatio and defy the drivers of units thought to be too heavy without power to arrest or even to weigh the threatening vehicle until the line is crossed and the damage is done?

In the light of all these circumstances, the Legislature saw fit to lay down one limitation covering all of the roads of the State and applicable alike to interstate and intrastate commerce.

All these and many others are practical questions which, in the wisdom of the courts throughout the years, have been left to the exclusive discretion of the Legislature. We submit that when these and many other practical problems are fairly considered it is readily obvious that, in the enactment of the statute, the Legislature did not attempt to exercise a forbidden control over interstate commerce in the guise of a police measure, but wisely and fairly adopted a measure honestly intended to protect its roads and bridges, and the safety of those who use them, to promote, and not prevent, interstate commerce by passenger automobile and light trucks by preserving smooth all-weather roads over which they may travel, and to conserve the State's finances by surfacing in the future more miles of the remainder of

its roads with materials adequate to support the loads permitted by the statute, yet inadequate to accommodate those permitted by the decree.

We further submit that the Statewide application of the statute, without geographical exception, was wholly justified and reasonable, either as a means of protecting the 57,000 miles of roads not included in the segment described in the decree, or as a means of protecting the thirty-seven and one-half miles of bridges in the State system which were not designed to carry heavier loads, plus the unnumbered others on the 57,000 miles of highways and city streets remaining. When both legitimate objects are considered together, it seems conclusive that the statute is and should be considered reasonable as a matter of fact, and that the lower court should be reversed.

This Court has repeatedly sustained the power of a state legislature to consider a problem of this character in its entirety and to refuse separate treatment of separate classes because of the administrative difficulties which might be incurred in so doing. In *Aero Mayflower Transit Co.* v. *Georgia Public Service Comm.*, 295 U. S. 285, an interstate motor carrier claimed a flat fee was an unreasonable one for highway use because he made only a limited use of the entire State road system. In that case, the Court said:

> "The appellant urges the objection that its use of roads in Georgia is less than that by other carriers engaged in local business, yet they pay the same charge. The fee is not for the mileage covered by a vehicle. There would be administrative difficulties in collecting on that basis. The fee is for the privilege for a use as extensive as the carrier wills that it shall be. There is nothing unreasonable or oppressive in a burden so imposed."

It will be observed that in that case, in passing upon the reasonableness of a tax assessed against interstate carriers,

the Court not only considered administrative difficulties but also took into consideration the highways of the State as a whole and found the fee reasonable for the privilege of using all of the roads even though it might have been excessive for the use of a limited portion of such system.

The Supreme Court of Wisconsin pursued the same principle in *Interstate Trucking Co.* v. *Damman,* 241 N. W. 625, 630. In that case interstate motor carriers challenged the State fee as an unreasonable burden, contending that the amount of the fee was made excessive by reason of the costs incurred by the State in maintaining highways and in carrying on other activities not utilized by or benefiting interstate motor carriers. On that point, the Court said:

> "Plaintiffs call attention to the allocation for fire roads. Section 20.49 (6) Stats. Roads within the forest preserves are nevertheless public roads and an integral part of the state highway system. They may not be used ordinarily by interstate truckers, but neither are many town roads. *The rule does not require an allocation to the particular road used by the trucker who is taxed.* Another allocation is for purchasing timber land adjacent to highways. Section 20.49 (7a), Stats. This was apparently intended to preserve timber along some of the highways to add to the attractiveness of the highways from a scenic point of view, which is clearly an incidental highway use. *The State's highway program and budget must be taken as a whole.*" (Italics ours.)

In *Carley and Hamilton* v. *Snook,* 281 U. S. 66, 74 L. Ed. 704, 50 S. Ct. 204, the Court considered a license fee required of intrastate operators, and the Commerce Clause was not in the case. Nevertheless the Court's following statement is applicable to interstate commerce, as shown by later decisions of the Court. The Court said:

> "A corollary of this contention is that although the fees are not per se disproportionate to the privilege of

operating over all the highways of the state, appellants are nevertheless entitled to receive licenses limiting the operation of their motor cars to the few highways which they wish to use, upon the payment of correspondingly reduced fees. But no constitutional principle is suggested, and we know of none, which would enable a licensee thus to regulate the extent of the privilege granted or to assail an otherwise valid tax upon it merely because a reduction of the privilege and the tax would better suit his convenience or his pocketbook."

The *Aero Mayflower* case, *supra*, decided after the *Snook* case, clearly applied that principle to interstate commerce.

This Court has always sustained the principle that difficulty of enforcement is a proper basis for defining the boundaries of a classification, or for the failure to subdivide a broad general class. In order to make a statute workable and enforceable the legislature may, in creating a classification, lay down a broad, general, easily enforceable description of a class, and if the classification is otherwise valid, the fact that some "innocent objects" are included in the class in order to "insure a reasonable margin for effective enforcement" the statute is nevertheless valid in its entirety.

In *Euclid* v. *Ambler Realty Co., supra* (272 U. S. 365), a zoning ordinance was considered in which it was urged against the validity of the ordinance that it excluded not only offensive and dangerous industries, but also the inoffensive. The Court said:

"Here, however, the exclusion is in general terms of all industrial establishments, and it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate. But this is no more than happens in respect of many practice-forbidding laws which this court has upheld, although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. (Citing cases.) *The inclusion of a reasonable margin to insure*

> *effective enforcement will not put upon a law, otherwise valid, the stamp of invalidity.* Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separate in terms of legislation." (Italics supplied.)

In *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192, a statute forbade not only the sale of intoxicating liquors but also non-alcoholic malt liquors. The latter provision was sustained as a necessary aid to the enforcement of the law forbidding the sale of intoxicating liquors. The Court said:

> "It does not follow that because a transaction separately considered, is innocuous, it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose the admitted power of the Government."

In *Silz* v. *Hesterberg, supra* (211 U. S. 31), this Court upheld the provisions of a statute, as an aid necessary, in the judgment of the Legislature, to the enforcement of the game laws of the State of New York, which made it an offense to possess certain game birds during the closed season whether they were killed within the State of New York or elsewhere. This decision was made in the face of a showing that the game birds in question had been killed in Russia during the open season and imported to New York during the New York open season, and that such birds were readily distinguishable from those native to New York, both while feathered and otherwise.

In *Holyoke Water Power Co.* v. *American Writing Paper Co.* (decided March 1, 1937), 81 L. Ed. (adv.) 383, the Court said, with reference to the complaint that an exception from the general terms of a statute should be made to fit the case

of one whose operations were not of the type at which the statute was actually aimed:

> "No principle of constitutional law, no dictate of fair dealing, lays a duty upon the Congress to single out for special treatment an individual or a few among the members of a common mass."

In *Bayside Fish Flour Co.* v. *Gentry*, 297 U. S. 422, a statute of California required licenses of those engaged in the business of canning, curing or processing fish. The appellant challenged the Act as a violation of the "Commerce Clause" and of both the "Due Process" and "Equal Protection" clauses of the 14th Amendment, showing that the fish it used were largely caught in waters outside the jurisdiction of the State. The Court held that the plain purpose of the Act was to conserve for food the fish found within the State and that its effect on interstate commerce was purely incidental. In disposing of appellant's claim that the Act violated the Commerce Clause, the Court said:

> "Sardines taken from waters within the protection of the state and those from without are, of course, indistinguishable; and to the extent that the act deals with the use or treatment of fish brought into the state from the outside, its legal justification rests upon the ground that it operates as a shield against the covert depletion of the local supply, *and thus tends to effectuate the policy of the law by rendering evasion of it less easy.*" (Italics supplied.)

See *Hebe Co.* v. *Shaw*, 248 U. S. 297, 63 L. Ed. 255, 39 S. Ct. 125, and *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498, 63 L. Ed. 381, 39 S. Ct. 172.

The applicability of the above cases to the instant case is plain. In fixing the gross load limitation at a point which will protect *all* of its highways, the State is acting within its power to include "a reasonable margin to insure effective enforcement."

Under the holding in the above case the State, in order to protect 57,000 miles of highway, 96% of all public roads in the State, had an absolute right to make its limitations apply to and include traffic over the remaining four per cent. It was authorized to include within its scope all the roads in the two segments regardless of their capacity, as a means of insuring effective enforcement. Failure to exclude such roads did not result in the unreasonableness of the statute as applied to any of the roads, either under the 14th Amendment or the Commerce Clause. Because the lower court so held, the decree is erroneous and should be reversed.

4. *Crediting appellees' evidence with all the effect which may properly be attributed to it, the reasonableness of the statute remains a fairly debatable question which should have been left to the Legislature* (Assignment of Errors Nos. 16, 24, 27).

From all the cases cited above it is clear that fairly debatable questions as to the reasonableness of a statute enacted to accomplish an end, which end is within the power of the Legislature, are those which should be left to the exclusive determination of the Legislature. *Sproles* v. *Binford, supra* (286 U. S. 374); *N. Y., N. H. & H. R. Co.* v. *New York, supra* (165 U. S. 628); *N. C. & St. L. R. Co.* v. *White,* 278 U. S. 456; *Silz* v. *Hesterberg, supra* (211 U. S. 31); *Bayside Fish Flour Co.* v. *Gentry, supra* (297 U. S. 422); *McLean* v. *D. & R. G. R. R. Co.,* 203 U. S. 38; *Morris* v. *Duby, supra* (274 U. S. 135); *Standard Oil Co.* v. *Marysville, supra* (279 U. S. 582); *Zahn* v. *Board of Public Works,* 274 U. S. 325; *Euclid* v. *Ambler Realty Co., supra* (272 U. S. 365).

A careful review of the record, and of the facts of which the Court may take judicial notice, clearly shows that there are several fundamental considerations sustaining appellants' position in regard to which there is no conflict in the evidence and that there remain numerous factors

bearing on the reasonableness of the statute which, when crediting appellees' showing with the greatest effect that can fairly be attributed to it, leave fairly debatable questions for the exclusive determination of the Legislature.

There is *no* evidence to show that the statute is unreasonable (1) as a means of protecting all of the highway bridges in the State except for twenty-five percent of those on the 6100 miles of roads in the State system, or of protecting the safety of those who use them, or (2) as a means of protecting the more than 57,000 miles or about 96 percent of all the roads in the State not surfaced with concrete or bituminous concrete pavement, or the safety of those who use them, or (3) that certain portions of even the definite segment of the State's highways are not surfaced either with concrete or bituminous concrete. As shown above, we submit that these undisputed facts which are conclusively shown in the record, are enough to reverse the lower court's decree.

We further submit that in the light of all the circumstances argued above, of the conflict in the testimony outlined above, and of the facts which the Court may and should judicially notice there are many questions bearing on the question of reasonableness which the most appellees have succeeded in doing is to show that they are fairly debatable. Since the burden is on appellees to show that the statute is so arbitrary and unnecessary as to admit of no reasonable difference of opinion as to its unreasonableness we submit that appellees have failed to sustain such burden, that such failure is fatal to their case and that the decree should be reversed.

Such questions which are not shown to be resolved against appellants or which are at least fairly debatable include the following: Is the statewide application of the statute reasonable as a means of protecting both the bridges and the

roads and the safety of traffic upon them? Is the statewide application of the statute reasonable as a means of establishing a standard for future highway construction or reconstruction? Is there a real relationship between a gross load limitation, in general, or the 20,000 pounds gross load limitation in particular, and the protection of the South Carolina pavements either concrete or otherwise, or between such limitations and the safety and convenience of those who use the roads? If the gross load limitation in question is reasonable, is there a real relationship between the provision that a tractor-semitrailer shall be considered as one unit for determining gross load and the protection of the roads? Is wheel and axle load the only reasonable limitation for vehicles using the roads of the State and are the roads in question capable of supporting axle loads of 16,000 to 18,000 pounds when they are not surfaced with concrete, when they are so surfaced, or when 60 percent of the concrete surfacing is without center joint? Is a 90 inch, as contrasted with a 96 inch, width limitation reasonable as a means of protecting either the roads and bridges or the safety of those who use them? Does a well connected system of concrete paved roads exist in South Carolina and are the gaps in the definite segment which are not surfaced with concrete "important" or "unimportant"?

We submit that all these, and many others, are questions in this case which have either been answered in favor of the statute or remain unanswered, and that those which are unanswered are fairly debatable; that each has a material bearing on the reasonableness of the statute when it is charged that the statute is either a violation of the Commerce Clause or the 14th Amendment, and that the Court erred in undertaking to decide such questions and that the decree should therefore be reversed.

III.

The Court's conclusions as to the invalidity of the statute are erroneous because based upon improper tests of reasonableness (Assignments of Error Nos. 12, 19, 20, 21, 24).

It is obvious from the District Court's opinion that it was decisively influenced by three factors which actually are wholly irrelevant to any issues of fact or law in the case. These are the following: (1) The Court thought that the Federal Highway Act (Secs. 1 to 56, Title 23, U. S. C.), and (2) that the Motor Carrier Act, 1935 (Secs. 301 to 327, Title 49, U. S. C.) in some way circumscribed the State's power to enact weight and width limitations statutes, and (3) the Court also in the 7th to 16th findings of fact (R. 78-81) laid great stress upon the alleged inconvenience, expense and loss occasioned interstate truckers and their shippers by the statute, and applied all of such factors as tests of reasonableness.

It is evident that the Court's emphasis on these three factors arose, in part, from erroneous conclusions the Court drew from four decisions of this Court: *Buck* v. *Kuykendall*, 267 U. S. 307 (R. 72); *Bush* v. *Malloy*, 267 U. S. 317 (R. 74); *Morris* v. *Duby*, *supra* (274 U. S. 135) (R. 71); *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405 (R. 68).

At this point we will endeavor to show the errors of the District Court in the above respects and in so doing will first discuss the three above described factors, then point out the effect of the Court's erroneous application of the four decisions above cited to the Court's consideration of such three factors.

The Three Above Factors.

It is conclusively settled by the decisions of this Court that these three factors, singly or in combination, are

wholly irrelevant to the issues in this case. We discuss them in the above order.

(1) *The Federal Highway Act:*

Preliminary to a discussion of this and the Motor Carrier Act, 1935, consideration must be given to the effect of an Act of Congress upon state police power statutes.

Where, as here, a State has power to act in the absence of national legislation, it is the uniform holding of all the decisions of this Court that such power is superseded by an Act of Congress *only* when the Act actually conflicts with the state law in issue. As was said in *Townsend* v. *Yeomans,* No. 781, decided May 24, 1937, 81 L. Ed. (adv.) 840, 847:

> "The case calls for the application of the well-established principle that Congress may circumscribe its regulation and occupy a limited field, and that the intent to supersede the exercise by the state of its police power as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted is in actual conflict with the state law" (citing cases).

In *Carey* v. *South Dakota,* 250 U. S. 118, it was held that the Federal Migratory Bird Act did not displace a state law which forbade the shipping out of the state of wild duck killed in season, because the Federal Act did not cover the precise subject matter of the state act. Authority to this effect could be multiplied almost indefinitely. See *Mintz* v. *Baldwin,* 289 U. S. 346, and *A., T. & S. F. R. Co.* v. *Railroad Commission,* 283 U. S. 380, and cases therein cited.

The rule apparent from the foregoing cases is this: *Where the Act of Congress does not actually supersede state power, then such Act has no effect whatsoever upon the state power.* It is clearly a case of "all the one thing or all the other." Every decision of this Court on this

subject has so held. This Court has *never* held that an Act of Congress which did not supersede State power, did in *any way* affect the State power. The attitude of the District Court on this point is contrary to every decision of this Court. *Buck* v. *Kuykendall, supra,* and *Bush* v. *Maloy, supra,* do not support the District Court.

Applying this and other principles it is plain that the Federal Highway Act does not and was never intended to in any way affect State power *to enact weight and size limitations.*

(a) The Act shows by its terms not only that Congress did *not* intend to occupy the field of weight and size limitations but also shows affirmatively the intention of Congress to *leave this power to the States.* Thus it restricts State powers in certain particulars but does not mention weight or size limitation; by Section 9 the aided highways are required to be "free from tolls of all kinds" and by Sections 15 and 48 the States are required to maintain the aided roads. These are the only provisions of the Act limiting State power or imposing duties on the States with respect to completed highways. By expressly restricting State power in these respects and by failing to mention the subject of weight or size limitation, Congress showed its intention to leave weight and size limitation to the States. *Sturges* v. *Draper,* 12 Wall. 19, 27; *Walla Walla* v. *Walla Walla Water Co.,* 172 U. S. 1, 15. By Sections 8 and 10 of the Act the approval of the Secretary of Agriculture in certain respects is required before Federal aid can be extended for new highway construction; and by Section 19 the Secretary is authorized to make such *recommendations* to the State highway departments (*not the State legislatures*) "as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon." The adoption of the recommendations

authorized by Section 19 are not included in the conditions precedent to granting of Federal aid which the Secretary may require under the authority of Sections 8 and 10; furthermore, whatever may be the powers conferred on the Secretary by Section 19 he has never prescribed weight or size limitations. See *Northwestern Bell Tel. Co.* v. *Nebraska State Railway Com.*, 297 U. S. 471, 478, 479.

In *Carley & Hamilton* v. *Snook, supra* (281 U. S. 66), a law of California requiring motor vehicle license fees was attacked on the ground that such fees were forbidden by Section 9 of the Federal Highway Act which requires Federal aid highways to be "free from tolls of all kinds." In upholding the California statute the Court said, (page 74):

> "Such fees were a common form of state license tax before the Federal Highway Act was adopted in 1921. That act contemplated the continued maintenance by the states of state highways, constructed with Federal aid. the expense of which must necessarily be defrayed from revenues derived from state taxation. *It cannot be supposed that Congress intended to procure the abandonment by the states of this well-recognized type of taxation without more explicit language than that prohibiting tolls found in Section 9.*" (Italics supplied.)

Paraphrasing the above, it assuredly cannot be supposed that Congress having restricted State power in certain particulars in the Federal Highway Act, intended to restrain State power to enact weight and size limitation laws without more explicit language than is contained in the Act.

(b) Since the States by Sections 15 and 48 of the Federal Highway Act are required to maintain the Federal aid highways, it follows that state weight limitation laws are the sole concern and function of the State since they are the greatest factor in maintenance. The reasoning in

Carley & Hamilton v. *Snook, supra,* that State license fee laws are not prohibited by Section 9 because, for one thing, States must maintain the highways, applies with equal force to the proposition that State weight limitation laws are likewise left to the State.

This Court calls attention to the provisions of the Federal Highway Act requiring maintenance by the State as evidencing one of two separate grounds justifying the right of the State to fix motor vehicles weight limitations irrespective of the Act, in *Morris* v. *Duby, supra,* (274 U. S. 135), as follows:

> "Conserving limitation is something that must rest with the road supervising authorities of the state not only on the general constitutional distinction between national and state powers, but also for the additional reason having regard to the argument based on a contract that under the convention between the United States and the state in respect to these jointly aided roads, the maintenance after construction is primarily imposed on the state."

(c) Any agreement to relinquish police power over its highways that might be found or implied in the acceptance by a State of Federal aid would be invalid for two interrelated reasons, (1) that a State cannot surrender such powers by anything short of a constitutional amendment, and (2) that the exaction of such an agreement from a state as a condition to receiving Federal aid is beyond the power of the Federal Government and would render the agreement and the appropriation of Federal aid unconstitutional. *U. S.* v. *Butler,* 297 U. S. 1, *Ashton* v. *Cameron County Water Improvement Dist.,* 298 U. S. 513.

It is thus apparent from the above that the Federal Highway Act does not and was never intended to in any way affect State power to enact weight and size limitations because (a) the Act itself shows the intention of Congress not

to occupy that field and affirmatively shows its intention to leave such power to the States; (b) the responsibility for maintenance, exclusively in the State, carries with it the power and duty to fix size and weight limits as a means of preservation, and (c) the convention between the Federal Government and the States is not an agreement by the States to relinquish police power over its highways because the States have no constitutional power to make such agreement and the Federal Government has no constitutional power to require it as a condition precedent to the receipt of Federal aid.

(2) *The Motor Carrier Act, 1935:*

The District Court held that this Act did not supersede the size and weight laws in question (Fourth conclusion of law, R. 84; Opinion, R. 57-64). Appellees did not take any cross-appeal. Every court to which this question has been presented has reached the same conclusion, obviously the only one possible.

L. & L. Freight Lines v. *Railroad Comm. of Florida*, 17 Fed. Supp. 13;

Werner Transp. Co. v. *Hughes*, 19 Fed. Supp. 425;

Houston & North Texas Freight Lines v. *Phares*, 19 Fed. Supp. 420;

Railroad Comm. of Texas v. *Southwestern Greyhound Lines*, 92 S. W. (2d) 296;

Werner Trans. Co. v. *O'Brian* (decision not published, D. C., S. Dist. Iowa, Feb. 15, 1937).

For the reasons stated at the beginning of (1) above, it is clear that the Motor Carrier Act, 1935, does not in any respect modify the exercise of State power in issue.

(3) *Inconvenience, Expense and Loss Occasioned Interstate Truckers and Their Shippers by the Statute:*

In Findings of Fact Nos. 7 to 16, inclusive (R. 78-81), the District Court recites the inconvenience that would be caused by enforcement of the South Carolina laws. We submit that (a) such findings and evidence bearing on them are wholly immaterial to any of the issues in this case; (b) that the appellants were under no obligation to rebut such evidence, and (c) that even without any attempt by the appellants to rebut such evidence, its weight, in the light of other evidence in the record, is insufficient to support such findings.

These findings dwell at great length upon the alleged inconvenience to interstate truckers and their shippers as the result of the enforcement of the Act. As will be hereafter indicated, such findings were *controlling influences,* in the lower court's conclusions as to the unreasonableness of the Act. It is elementary that if the power in the State exists and that if the means adopted bears a reasonable relationship to the exercise of that power, the consequent effect upon interstate commerce of the exercise of that power is entirely immaterial.

In the Court's opinion in the case of *Erie Railroad Co.* v. *Board of Public Commrs.,* 254 U. S. 394, is found a strong statement to that effect. There the railroad had been directed to pay the expense of eliminating fifteen grade crossings. The requirement was made in the exercise of the State's police power. The railroad challenged the Act, among other reasons, as imposing an unreasonable burden on interstate commerce. The case was decided in 1921 long after the enactment of the Interstate Commerce Act. The railroad was a part of an inter-connected national system of railways. The railroad contended, as do appellees here, that the Act must be reasonable in order to be upheld. It

put in evidence that it did not have assets sufficient to make the changes, at least without interfering with the proper development of its interstate commerce and contended that it was "not reasonable to require an expenditure of $2,000,000 from a company that has not more than $100,000 available." The order, and statute upon which it was based, were upheld solely upon the power of the State to provide for the safety of its citizens and the duty of the interstate carrier to contribute to the accomplishment of that legitimate object as establishing the relationship between the order and its object. The consequent effect of the order on interstate commerce was disregarded and in that respect, when speaking of public thoroughfares, the Court said:

> "Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places, to which the public is invited, and that it necessarily frequents, a state, in the care of which this interest is, and, from which ultimately the railroads derive their rights to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, *whatever may be the cost to the parties introducing the danger.* That is one of the most obvious cases of the police power; or, to put the proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires." (Italics supplied.)

Likewise, it can be said in this case as between trucks and the highways of South Carolina the highways represent the more important interest of the two. They always are the necessity of the whole public, while the trucks, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the State, in the care of which this interest is, and from which, ultimately, the trucks derive their right to occupy the roads, has a constitutional right to insist that its highways shall not be made dangerous to the public, *whatever may be the cost to the parties introducing the danger.* The authority of the trucks to project their moving masses along highways must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires.

Again, and on the same page, the Court said:

> "It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. *That the states might be so foolish as to kill the goose that lays the golden eggs for them has no bearing on their constitutional rights.* If it reasonably can be said that safety requires the change, it is for them to say whether they will insist upon it and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil (citing cases). To engage in interstate commerce the railroads must get onto the land; and to get on to it must comply with the conditions imposed by the state for the safety of its citizens * * * *if the burdens imposed are so great that the road cannot be run at a profit it can stop, whatever the misfortune the stopping may produce.*" (Italics supplied.)

In *N. Y., N. H. & H. R. Co.* v. *N. Y., supra* (165 U. S. 628), a New York statute requiring both interstate and intrastate trains to be heated in a certain way was challenged as an "unreasonable burden on interstate commerce."

That case was decided in 1897, long after the enactment of the Interstate Commerce Act. In that case, as here, the carriers involved were part of an inter-connected national system for transportation regarding which Congress had partially occupied the field of regulation. Concerning the effect upon interstate commerce of the enforcement of the State statute, sustained as a police measure, the Court said:

> "Counsel for the railroad suggests that a conflict between state regulations in respect of the heating of passenger cars used in interstate commerce would make safe and rapid transportation impossible; that to stop an express train on its way from New York to Boston at the Connecticut line in order that passengers may leave the cars heated as required by New York, and get into other cars heated in a different mode in conformity with the laws of Connecticut, and then at the Massachusetts line to get into cars heated by still another mode as required by the laws of that commonwealth, would be a hardship on travel that could not be endured. These possible inconveniences cannot affect the question of power in each state to make such reasonable regulations for the safety of passengers on interstate trains as in its judgment, all things considered, is appropriate and effective. Inconvenience of this character cannot be avoided so long as each state has plenary authority within its territorial limits to provide for the safety of the public according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any inconsistent regulations of the states covering the same ground."

Sproles v. *Binford, supra,* is specific authority on this point. The record in that case shows that the District Court made exactly the same findings with reference to shippers and truck operators in Texas as did the lower court in this case. This appears at the bottom of page 383

of this Court's opinion. The possibly greater convenience of truck transportation does not prevent the Legislature from providing regulations which, within the range of its judgment, are suitable for highway conservation. *Sproles* v. *Binford, supra* (at page 394). See also *Morris* v. *Duby, supra* (at page 144). The fish and game cases are also authority for this proposition. In *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422, and in *Silz* v. *Hesterberg, supra* (211 U. S. 31), as in this case, the State's police power was invoked to *preserve the State's property.* In those cases, the acts were sustained even though they *prohibited* foreign commerce. See also *McLean* v. *D. & R. G. Ry. Co., supra* (203 U. S. 38).

From the above, it is clear that it is established law that the consequent effect upon interstate commerce of the exercise of a State's police power is entirely immaterial. On the same authority, it is just as clear that *such effect, being immaterial, cannot, conversely, be applied as a test of the reasonableness and consequent validity of a police power measure.* As will be hereafter shown, the lower court did consider the effect upon interstate commerce of the enforcement of the South Carolina statute *as a test of its reasonableness.*

It is submitted that, since the voluminous evidence introduced by appellees bearing upon the effect of the enforcement of the Act was wholly immaterial as a test of reasonableness, the appellants were entirely justified in not undertaking to rebut it. The record shows that appellants made no such effort, which should be considered in weighing the effect of the great volume of appellees' evidence on the subject.

It may be that such evidence was admissible to show appellees' interest as plaintiffs or to show that the statutes complained of constituted a burden on interstate commerce as *preliminary* to a showing that such burden was an *un-*

reasonable one. However, the statistics of truck registrations in South Carolina do not support the inference that higher weight limitations are desired upon the South Carolina highways by more than a very small percentage of truck operators and industries in general. Of the 30,497 trucks registered in South Carolina in 1936, only 328 were registered for authority to carry more than three tons of net weight, and of these only 19 were registered for authority to carry more than four tons of net weight (R. 272). Carriers for hire use semi-trailer combinations of two to three tons capacity (R. 229). If there existed such a demand for heavy duty truck transportation in South Carolina, we may reasonably assume that the truck registration figures in South Carolina would show a much higher percentage of registration for authority to carry four or five tons of net load. A truck weighs less than a semi-trailer combination, and the smallest tractor semi-trailer combination weighs about twelve thousand pounds empty (R. 114). It therefore appears that the vehicles thus referred to could carry net loads of eight thousand to ten thousand pounds and still comply with the 20,000 pounds gross weight limit law (R. 114), yet only one per cent of the trucks are registered to carry eight thousand pounds, and only .06 per cent of the trucks are registered to carry as much as ten thousand pounds. On the other hand, over 27,000 of the trucks are registered to carry not more than four thousand pounds net load (R. 272).

Mr. Moorefield's statement (R. 257) reads, in part, as follows: "the total number of trucks having more than two tons capacity, together with all the busses and lighter trucks carrying trailers, now operating in the State would not exceed 3,000. This means that the State is expending $18,000,000 to accommodate 3,000 vehicles and combinations of vehicles. These 3,000 vehicles represent only a little more than one per cent of the total number of vehicles using the State

highways, while the estimate of $3,000 per mile additional construction cost necessary in order to provide for these vehicles represents about 15 per cent of the average per mile construction cost."

From the above, it is clear the Court's conclusion as to the magnitude of the alleged burden on interstate commerce was unsupported by the weight of the evidence, and that all of such evidence was immaterial and could not properly be applied as a test of the reasonableness of the statute.

It is plain that the Court erred in allowing itself to be influenced in the slightest degree, in passing on whether or not the statute in question is a violation of the commerce clause, by the consideration of either the Federal Highway Act or any developments pursuant to it, the Motor Carrier Act, 1935, or the increased cost of or inconvenience to interstate commerce occasioned by the enforcement of the statute. The only real issue is whether the South Carolina statute is a legitimate measure as a *means of protecting its highways and those who use them*, utilized by the Legislature to accomplish its admitted power to so protect.

The Four Decisions Erroneously Applied.

One of the elements which contributed to the confusion of the District Court in this respect was its failure to understand *Buck* v. *Kuykendall*, and *Bush* v. *Maloy*. The Court's peculiar misunderstanding of these cases is made plain in its opinion (R. 72, 73, 74). The lower court's fundamental difficulty was its failure to observe the well established distinction between, on the one hand, the exercise of State power which is forbidden by the Commerce Clause without action in the premises by Congress (sometimes called the exclusive power), and, on the other hand, the exercise of State power which is permitted until Congress has precisely and completely occupied the field (sometimes

rather inaccurately called the concurrent power). The distinction between these two kinds of power and the principles regarding them is explained in *The Minnesota Rate Cases* (*Simpson* v. *Shepard*), 230 U. S. 352 at 399-400, where many illustrative cases are cited, and in *Townsend* v. *Yeomans, supra,* 81 L. Ed. (adv.) 840 at 848. Of course the line of demarcation between the two is often difficult of ascertainment, but that was not the difficulty into which the District Court fell.

It is manifest that *Buck* v. *Kuykendall* and *Bush* v. *Malloy* are ruled by the first described principle, that the power the States sought to exercise in those cases was exclusively in the Congress, or, as stated in *Stephenson* v. *Binford, supra,* (287 U. S. 251) at page 266, the statutes involved in those cases imposed "discriminations relating" to interstate commerce. This was evident from the beginning, and was expressly stated in *Bradley* v. *Public Utilities Commission,* 289 U. S. 92 at 95. The *Bradley* case is an example of the second principle, that is, concurrent power which the State can exercise until Congress acts. This Court's reference in the *Buck* case to the Federal Highway Act was first explained in the *Bush* case. It was further explained in the *Bradley* case when the Court made it clear that such reference in the *Buck* case did not mean that such Act superseded or affected the State action there in question, *because such State action was invalid under the Commerce Clause without any entry into the field by Congress.* The reference in the *Buck* and *Bush* cases to the Federal Highway Act was for the purpose of showing that such Act merely made explicit in matters in the exclusive field of Congressional power the implied prohibition against discrimination contained in the Commerce Clause. The subsequent decisions of this Court have sharply confined this language to the facts of the case in which it was used, namely, to situations where

a State action invades the exclusive field and discriminates against interstate commerce.

The Court, in the *Bradley* case, said (p. 95), referring to the *Buck* and *Bush* cases:

> "The test employed was the adequacy of existing transportation facilities; and since the transportation in question was interstate, *denial of the certificate invaded the province of Congress.*" (Italics supplied.)

The *Bradley* case also expressly identified *Morris* v. *Duby, supra,* and *Sproles* v. *Binford, supra,* as falling within the second principle, that is, they involved State power which might be exercised until Congress acts, as does the latest pronouncement of the Court on this subject, *Townsend* v. *Yeomans, supra.* The *Bradley* case did not turn on the failure of the interstate carrier to show that no other route was available for its purpose. Reference to such failure was made to show that the primary purpose of the Ohio Act in question was to prevent highway congestion, thus identifying the Act as one in the field where the States may act until Congress sees fit to do so. *Morris* v. *Duby, supra,* was decided two years after the *Buck* and *Bush* cases. In that case the Court referred to the *Buck* case as authority for the proposition "that the state may not discriminate against interstate commerce" and held that notwithstanding the Federal Highway Act conserving limitation is something which must rest with the road supervising authorities of the state.

Morris v. *Duby* requires more than a brief analysis on the point now under discussion because of the way the District Court misunderstood and misapplied it. In its opinion (R. 68, 71) and in a preliminary statement at the commencement of the trial (R. 98) the Court stressed the following sentence from page 145 of the Duby opinion:

> "Regulation as to the method of use therefore necessarily remains with the state and cannot be interfered

with *unless the regulation is so arbitrary and unreasonable as to defeat the useful purpose for which Congress has made its large contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them.*" (Emphasis supplied.)

For convenience, the italicized portion of the above quotation will hereinafter be referred to as the "unless clause."

After repeating the above quotation at the beginning of the trial the Court then said: "In other words, we will pass upon the question as to whether the Act constitutes an unreasonable burden on interstate commerce • • •."

The opinion of the lower court (R. 68, 71) is explanatory of its findings. In explaining its conclusions as to the unreasonableness of the South Carolina Act, the court first observes that the highways it describes in its decree are "great arteries of interstate commerce" that they "carry the larger part of interstate traffic moving to and from the state, as well as such traffic passing through the state to and from Georgia and Florida and the states to the north" and concludes "we think it an unreasonable burden upon the interstate commerce moving over them to enforce the restrictions above mentioned, and thereby virtually close the roads of the state to a large part of such commerce • • •." The court then (R. 65) observes the development of commerce by truck and the dependency of southeastern states upon such truck commerce, that a large part of this interstate traffic would be virtually barred from the highways of South Carolina and concludes (R. 65) that "the reasonableness of the restrictions must be viewed in the light of such a consequence." The court again (R. 68) refers to the Federal aid which had been extended to the State of South Carolina and states that while the fact that the Federal government has aided in the construction of the highways does not detract from the power of the State to regulate and control them "it is, we think, a circumstance

which should be considered in passing upon the reasonableness of a state statute the effect of which would be to drive an important part of interstate commerce from the highways and withdraw them to that extent from the use for which they were intended and for which the federal aid was granted." The court then quotes a long excerpt from *Nashville etc. R. Co.* v. *Walters, supra,* in order to show the purpose of Congress in extending Federal aid, then refers to the experience of other States and the judgment of those having special knowledge with respect to dealing with size and weight of vehicles using the highways as bearing upon the reasonableness of the statute. The opinion is replete with affirmative statements to the effect that the findings of fact and conclusions of law reached by the court pertaining to the reasonableness of the South Carolina statute are based directly upon the court's consideration of the effect of the enforcement of the statute upon interstate commerce and not exclusively upon the relationship between the statute as a means and the preservation of the highways and safety upon them as the end sought to be accomplished. It is apparent that this course was pursued by the lower court in reliance upon its misunderstanding of the "unless clause" in the above quoted portion of the opinion in the *Duby* case.

We will now endeavor to demonstrate (what perhaps needs no demonstration) that *this* court did not mean to say, in the above quoted excerpt from the *Duby* case, or at any other place in the opinion, that the Federal Highway Act or any developments under it supersedes or affects in any degree the power of the State to make and enforce weight and size limitation laws. This is evident from the principles involved in the discussion just above of *Buck* v. *Kuykendall* and *Bush* v. *Malloy,* from an independent consideration of the *Duby* opinion as a whole, and from the subsequent opinions of this Court construing and applying it.

It will be observed from the above that the lower court attributed to the "unless clause" in the *Duby* opinion authority (1) to test the reasonableness of the South Carolina act in question by the effect upon interstate commerce of its enforcement and (2) to test the reasonableness of the South Carolina act by its effect upon the purposes of Congress evidenced by the Federal Highway Act and its financial contributions thereunder. We submit that in both of these respects the lower court was in error and that such error so permeated its entire opinion, findings and conclusions as to produce fatal error in its decree.

As stated above, there are two fundamental rules of law established by long lines of decisions by this Court which the lower court's application of the "unless clause" in the *Duby* case violates. These rules are (1) That the consequent effect upon interstate commerce of the exercise of a State's police power, otherwise valid, is entirely immaterial and, being immaterial, cannot be applied as a test of its reasonableness and consequent validity and (2) Where an act of Congress does not actually supersede police power which a State may exercise until Congress acts the Federal act has no limiting effect whatever upon the State power, that supersession will not be implied unless the Federal act, fairly interpreted, is in actual conflict with the State law.

We submit that if a State police power statute providing one limitation, and reasonable under ordinary tests, must provide a higher limitation in order to preserve its validity when its reasonableness is further tested by its consequent effect upon interstate commerce, to subject the statute to such further test violates the first of the above well established rules. We further submit that if a State police power statute, reasonable under ordinary tests, may be unreasonable or must be less stringent when further tested by the terms or effect of the Federal Highway Act, or any

developments pursuant thereto, the State's power is thereby and to that extent directly circumscribed by such Federal Highway Act and that to apply such test violates the second well established rule mentioned above.

The "unless clause" upon which the lower court based its decision, appears as a qualifying clause used in a negative sense in the next to last sentence in the *Duby* opinion. Since the meaning ascribed to that clause by the lower court would have meant the overturning of at least two well established and long standing rules of law it is inconceivable that the Supreme Court would have intended its words to have such meaning without some explanation of its former decisions, the reasons for their reversal and the basis and reason for the establishment of such an entirely new rule. The fact that such meaning was not intended is further proven when in the *Sproles* case, *supra,* and the *Bradley* case, *supra,* such meaning was not attributed to its language. It is not enough to avoid the rule that such State acts may not be tested by their effect on interstate commerce to point out that in the *Sproles* case and the *Duby* case no well connected system of highways was involved because the same rule was applied in the *Erie* case, *supra* (254 U. S. 394), and the *New Haven* case, *supra* (165 U. S. 628). In those cases a national system of well connected railways was involved yet the reasonableness of the State police power statutes was not subjected to the test of their effect on interstate commerce. Neither is the rule avoided by pointing out that in the *Duby* case and the *Sproles* case there was no such showing of interference with interstate commerce as was made in the instant case. The reasonableness of the State statute in the *Erie* case was not tested by its effect on interstate commerce even though the court said that if compliance by the railroads was burdensome "it could stop". In the *New Haven* case compliance with the regulations "could not be endured". In the *Bay-*

side case, *supra* (297 U. S. 422), and the *Hesterberg* case, *supra* (211 U. S. 31), interstate commerce was absolutely prohibited as a means of preserving the State's property. In short, the meaning ascribed by the lower court to the language in the "unless clause" cannot possibly be reconciled with prior or subsequent decisions nor with the preceding portions of the *opinion in which it appears,* and it is not to be assumed that the court intended to invalidate two old rules and lay down a new one in the manner in which it used such language.

The meaning ascribed by the lower court to the "unless clause" in the *Duby* opinion is inconsistent with previous statements in the same opinion. There the court said:

> "An examination of the Acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens."

The Federal Highway Act had been passed when the *Duby* opinion was rendered and was one of the acts examined. In fact that act was necessarily one of those so examined because the alleged limiting effect of such act was the principal claim relied upon by the appellant in that case. There was nothing in it "express or implied" to subject the State statute to the test of compliance with the purpose of such act. The "national legislation especially covering the subject of interstate commerce" could not therefore have meant the Federal Highway Act and for the

same reason the Motor Carrier Act, 1935, could not constitute the requisite Act of Congress for it does not regulate size and weight of vehicles. The above excerpt was quoted in the *Sproles* case and no such limitation as the lower court would read into the "unless clause" was there applied.

The court in the *Duby* opinion next quotes with approval from the *Buck* case the following:

> "With the increase in number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject (citing cases). Neither the recent Federal Highway acts nor the earlier post road acts do that (citing statutes).

There the court rejects the contention that the Federal Highway Act does, in any manner, affect State power because it does not deal "specifically with the subject" of size and weight. The meaning ascribed by the lower court to the "unless clause" would be inconsistent with the above quotation.

The *Duby* opinion then reaffirms the first general rule mentioned above when it rejects the inability of a truck company to make a profit as a test of the reasonableness of the act. If the purpose of the Congress expressed through the Federal Highway Act may be defeated by the increase in operating cost of interstate carriers using South Carolina roads with trucks which comply with the law (as the lower court would interpret the "unless clause") the observation in the *Duby* case concerning the carrier's inability to make a profit would be inconsistent with the

lower court's interpretation of the "unless clause" in the same opinion.

The court then rejects the claim of fraud by placing complete reliance in the judgment of the Highway Commission on the question of the need for the regulations *as a means of preserving the roads.* The only test there applied was the Commission's judgment as to the need for the regulations for conservation purposes, not the question of conflict with the aims of Congress or the effect of their enforcement on in[illegible]at [illegible]mmerce.

At no point in the *Sproles* case is there any intimation by the court that the reasonableness of the Texas act was to be in any way subjected to the tests the lower court in this case would read into the "unless clause". In the *Bradley* case the court quotes the *Duby* case as authority for the proposition that since "Congress has not dealt with the subject" * * * "The State may exclude from the public highways vehicles engaged exclusively in interstate commerce, if of a size deemed dangerous to the public safety." In the *Bradley* case the only qualifications on State power to enact and enforce size and weight laws or even regulations to prohibit the use of congested roads, which were mentioned by the court, were the object (to promote safety) and the legislative judgment deeming them necessary. Neither their consequent effect on interstate commerce nor their effect on the object of Congress as expressed in the Federal Highway Act were applied as tests. No mention of such a meaning of the "unless clause" was even intimated by the court in the *Bradley* case.

It is also pertinent that the "unless clause" in the *Duby* case was used in a negative sense. Even to attribute to it the meaning adopted by the lower court (which we do not believe is justified), attention is called to the fact that the court did not affirmatively hold that regulations, otherwise valid, which would defeat the "useful purpose" for which

the contributions were made, would result in the invalidity of the act. Attention is also called to the fact that in the sentence preceding that in which the "unless clause" appears the court, without qualification, held that *conserving limitation* must rest with the road supervising authorities of the State. The following sentence refers to *"regulations as to method of use."* There may have been some significance in the differentiation in terminology in the two sentences, for obviously "regulations as to methods of use" has a different meaning than "conserving limitation."

From all of the above it is clear that whatever the court did mean by the use of the "unless clause" in the *Duby* opinion it did *not* mean (1) that the reasonableness of a size and weight limitation may be tested by its effect on interstate commerce or (2) that size and weight limitations may be tested as to reasonableness by their effect upon the purpose of Congress in passing the Federal Highway Act or making financial contributions thereunder. It is clear that the lower court, in construing the "unless clause" as it did, erroneously applied the law and that such error resulted in the erroneous decree.

Having shown by the foregoing that the Supreme Court, in the *Duby* case, did not intend by the use of the so-called "unless clause" the meaning which was attributed to it by the lower court, if it is pertinent to the issues in this case we hereby briefly summarize our affirmative position as to what the court did mean by that language.

The meaning of the "unless clause", shown by the propositions announced by the court in the preceding portions of that opinion, by the language used in that clause itself and by the application of that opinion in subsequent cases, notably the *Sproles* case and the *Bradley* case, is that, if a State statute enacted to preserve the highways or protect the traveling public is not so unreasonable and arbitrary as to violate the 14th Amendment, it does not violate

the commerce clause nor conflict with the purposes of the Federal Highway Act in the absence of discrimination against interstate commerce. In other words the purposes of Congress in the enactment of the Federal Highway Act are not, in any degree, an additional measure of the reasonableness of the State statute.

But even if we should be in error as to the meaning of the so-called "unless clause" and if "the useful purposes" of Congress expressed in the Federal Highway Act were to be considered as the standard by which the validity of the State statute is to be measured, that fact would not restrict the State's police power to regulate the *size and weight* of trucks using the roads in the absence of specific provisions by Congress to that effect. Although the obvious purpose of the Federal Highway Act was to help the States construct better roads it was not its purpose to prescribe the size and weight of vehicles which might use them nor to prevent the States from so doing. There is no provision in the Act to that effect. This Court, in the *Duby* opinion, expressly declared that there is nothing in such act, express or implied, which would do that. The attack on the Oregon statute in that case was based upon the alleged defeat of the purpose of Congress in contributing funds under such act. The trucking company there charged that a 16,500 pound weight limitation applied to an interstate carrier using a Federal aid road would do so, and that its inability to make a profit in its operations had the same effect. These and all other allegations of the bill, admitted as true on motion to dismiss, did not avail to prevent the dismissal of the suit on the ground "that it did not state a cause of action".

In the instant case the lower court concluded that the enforcement of the assailed statute would make it more expensive for appellees to operate in South Carolina than in some other States because they must haul lighter loads or

use more narrow trucks. From this it concluded that some interstate commerce might be burdened or prohibited and, from that, concluded that one of the purposes of Congress in extending Federal aid might be interfered with or defeated. From the *Duby* case alone it is clear that even such increased expense (which we do not concede was proven in the case at bar) would not operate to defeat any purpose of Congress referred to in the "unless clause" in the *Duby* case.

In relating the two Federal Acts and the inconvenience to interstate motor carriers to the reasons for its decision the lower court stressed some of the statements in *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405 (R. 68). After referring to the qualifying language in the last sentence of the *Duby* opinion as the basis for its new rule for testing the reasonableness of the statute, it refers to a long excerpt from the opinion in the *Walters* case as explanatory of the purpose of the aid extended by the Federal Government under the Federal Highway Act in the development of interstate commerce. For the reasons above urged it is apparent that the purpose of the Congress, as explained in such Highway Act, or otherwise, can not possibly operate to circumscribe State power without outright supersession. The *Walters* case is not authority for the interpretation placed upon the Federal Highway Act by the court below, nor is it controlling on any of the issues in the instant case. In the *Walters* case the Supreme Court of Tennessee had refused to consider evidence offered by the railroad company bearing upon the reasonableness and consequent validity of a State statute requiring the railroad to pay one-half of the cost of a grade separation. Part of the testimony in question was that which pertained to the Federal Highway Act and the many developments in transportation resulting from motor vehicles and highways. It is part of this Court's summary of the proffered evidence which is quoted

by the court below. In the *Walters* case this Court held that the reasonableness of the Tennessee requirement bearing upon the obligation of a particular property owner depended upon the *relationship* of that property owner *to the evil* sought to be corrected by the statute. It held that evidence pertaining to developments in highway transportation and similar matters was pertinent in determining the reasonableness of the Act under the 14th Amendment *because it bore upon the relationship between the means and the end,* that is, the obligation *or duty* of the railroad to eradicate the evil or to effectuate the convenience sought to be accomplished by its financial contribution. There the relationship rested upon the duty of the railroad, previously the cause of the danger and the chief beneficiary of the convenience, to pay the cost of curing the evil. It held that the evidence quoted by the court below plus much other evidence as to changes in economic conditions might bear on the railroads responsibility for the danger or the amount of benefit it received from the improvement. This Court did not pass upon that evidence but merely held that it was pertinent in considering whether or not the duty under such circumstances still exists.

There is no parallel in the *Walters* case with any of the questions involved herein. Here, the relationship is purely a matter of physics. None of the evidence of the character discussed in the *Walters* case and cited by the court below operates to reduce or eliminate the destructibility of a motor vehicle, or to minimize the duty of highway users to avoid the destruction of the roads they use. The statute here in issue is based on the obvious principle of requiring one who is benefited by the highways to conform to regulations which conserve them. In the *Walters* case the court did not announce any new principle of law; it only applied well settled rules to the facts presented. ***But the application which the District Court sought to make of the two Federal***

statutes above mentioned and the above cases, unlike the Walters case, calls not for the application of established rules to the record facts but for the abandonment of long established rules of law and the making of a new rule.

The lower court not only applied tests of reasonableness which were erroneous as a matter of law but improperly applied such erroneous tests as a matter of fact. To state it briefly, the lower court held the Act unreasonable because it concluded that its enforcement would defeat the useful purposes for which the Congress, pursuant to the Federal Highway Act, has extended Federal aid to the State of South Carolina. We submit that if it is material to the issues, the enforcement of the Act in question will *carry out*, rather than defeat, the purpose for which Congress has made such contribution. Without an extended discussion of the purpose of Congress in extending such aid, it must be admitted that it was extended to assist in the construction of highways, whatever may be the purpose for which such highways, once built, may be used. By the acceptance of such aid the State undertook to maintain the aided roads. If highways are to be used at all, they must be preserved. If trucks heavier than those which the roads may properly bear are permitted to use them, the roads themselves will be destroyed. If trucks wider or heavier than those which are safe are indiscriminately permitted on the roads, then the expected use of, and commerce over, the roads will be impaired. It necessarily follows that size and weight limitation statutes are, in fact, aids to interstate commerce. They preserve the roads over which it is conducted and which make such commerce possible. It must be conceded that some weight and width limit is necessary. One witness testified (R. 156) that trailers built by his company were capable of carrying loads of from seven and one-half tons up to *one hundred tons*. Neither Congress nor any Federal administrative body has laid down limita-

tions to preserve roads. Whether or not Congress or any subordinate agency may do so is not involved in this appeal. The State is the sole agency which now has the power to do so. If discrepancy exists between State limitations to such an extent as to interfere with the interstate commerce *passing over* the roads, once built and properly maintained, there is no evidence that Congress has deemed it sufficiently material to defeat its purpose, for there has been passed no act of Congress bearing on the subject. That Congress has *not* deemed its purpose frustrated is evidenced by section 325 of the Motor Carrier Act, 1935, where it directs the Interstate Commerce Commission to "investigate" and "report" on the "need" for such regulation. No such report is shown and if such report had been made in the affirmative, that would not mean that the Congress would agree with its subordinate agency.

If Congress intended that the commerce it contemplated necessarily included trucks weighing more than 20,000 pounds each, it would have confined its aid to roads built of concrete. The only roads for which the court held the Act unreasonable were those surfaced with concrete. The Congress has not limited its aid to such roads and the record affirmatively shows its aid has been extended for roads surfaced with other materials (R. 253). Of the 2,797 miles in South Carolina on which Federal aid has been expended with approval of the U. S. Bureau of Public Roads, only 989 miles, or less than 36 per cent, have been surfaced with concrete or bituminous concrete. If roadways surfaced with concrete are essential to the movement of heavier and wider vehicles than those permitted by the statute, and that is the effect of the lower court's decision, the Congress has expressed no intent to promote interstate commerce *by such heavier and wider vehicles* because Federal aid has not been confined to the construction of *concrete* roads. Because the lower court concluded that Congress intended to pro-

mote interstate commerce by truck, it does not follow that it necessarily intended such truck commerce should be by vehicles heavier than 20,000 pounds or more than 90 inches wide. There is no showing of any such intent by even the Interstate Commerce Commission on the subject. It is therefore clear that weight and size limitations are aids to interstate commerce and there is no showing in the record that the specific limitations involved here are such as to defeat any ascertainable intention of the Congress. As previously pointed out, the highway traffic over South Carolina roads conducted by vehicles as heavy as 20,000 pounds is enough to be dangerous to roads and safety, yet is negligible when compared with the aggregate traffic by automobile and lighter trucks. Even to carry out the intent of the Federal Highway Act, it is obvious that doubts as to ability of pavements should be resolved against heavier trucks in the fair consideration of the rights and interests of the great majority of those who use the highways.

It may be argued that even though the Federal Highway Act may not be a proper test of the reasonableness of the statute, the development of interstate highways as the result of such Act, and the development of traffic over them, has operated to change the nature of the subject matter of the statute so that it is no longer a "matter which admits of local treatment according to the requirements of local circumstances." We submit that the evidence does not warrant any such conclusion and in fact shows the converse. Common observation shows that weight and size limitations pertaining to motor vehicles depend, for their validity upon the physical characteristics of the highways over which they operate. National uniformity in such regulations must necessarily depend upon national uniformity in the physical characteristics or the load supporting capacity of public highways. There was not even any attempt by appellees to show national uniformity of high-

ways in either respect. The thickness of the concrete pavement was a premise upon which each expert witness based his opinion as to the capacity of the slab. There is no showing as to any semblance of national uniformity in the thickness of slabs on such roads as are surfaced with concrete, and we submit that none exists. There is no showing as to any semblance of an interconnected national system of *concrete* highways, and we submit that none exists. The record in *Sproles* v. *Binford, supra*, indicates the absence of such system in Texas and the record here indicates the absence of such system in South Carolina.

Furthermore, even if such uniformity in concrete slabs did exist, we have shown in our subdivision (d) under Point II—1—of this brief that the subgrade is an essential part of every road, that there is no uniformity in subgrade conditions, and that they vary greatly with soil and climatic and other conditions throughout the country. The National Conference on Street and Highway Safety frankly recognizes these facts (Appendix VI, p. 159) when it says that "In view of the varying conditions of traffic, and lack of uniformity in highway construction in the several states, no uniform gross weight limitations are here recommended for general adoption throughout the country."

Aside from these physical considerations, the sheer impracticability of the enforcement of such regulations by a national corps of Federal traffic officers, who would be obliged to prosecute violators of such limitations in Federal tribunals as violators of Federal laws is convincing proof that these matters are, and still remain, matters not only admitting but requiring local treatment according to local circumstances.

It is, furthermore, obvious that these limitations are not only local matters but that their effect upon interstate commerce is purely incidental. The Act applies to interstate and intrastate commerce alike. It does not apply directly

to the business of the appellees. It does not apply at all unless appellees seek to use the highways belonging to the State in the conduct of their business.

To adopt the tests of reasonableness and the rule which would be required in sustaining the lower court's decision would be to subject the States, in the management of their own property and their own affairs, to such an "intolerable supervision as to be repugnant to our fundamental ideas of government." In the ambitious promotion of highway commerce by the Congress, the States would be subjected to the burden of surfacing their own highways in such a manner as to be capable of bearing any type of commerce the Congress might see fit to develop and to the intolerable burden of so policing their highways as to confine the heavy traffic to the "great arteries" of interstate commerce in order to keep it from breaking over, at the innumerable intersections within the States' borders, upon the weaker roads incapable of supporting heavy loads without destruction. The meager showing by appellees in this case is no justification in fact or in law for the adoption of such a far-reaching and unwise policy.

IV.

The District Court had no power to classify the roads and bridges or to rewrite the width limit as those are legislative functions; and lacking such power the Court was required under the evidence and applicable law to hold the entire statute valid as to all roads and bridges (Assignments of Error Nos. 24, 28, 29).

The Court held in its second conclusion of law and by paragraph (3) of its decree that the statute is reasonable as to all of the 60,000 miles of roads in the State except those described in paragraph (1) of the decree, hereinabove referred to as the "definite segment" and the "indefinite

segment", and in such paragraph (1) it enjoined enforcement of the weight limit as to such described roads (R. 84, 85, 86). Those so described in paragraph (1) include a part of the 2,417 miles of concrete and bituminous concrete described by the Court as "standard pavement" (Finding of Fact No. 17, R. 81) and the portions of low type roads interspersed among the mileage of such "standard pavement" (Finding of Fact No. 18, R. 81). The Court also in paragraph (1) of the decree enjoined enforcement of the 90 inch width limit on the roads described in such paragraph, provided the vehicle does not exceed 96 inches in width (R. 86). In paragraph (2) of the decree it is provided that the injunctive order in paragraph (1) shall not extend to bridges on the described highways too weak or narrow to carry trucks permitted to operate by paragraph (1), provided notices forbidding such use are posted on such bridges (R. 86).

Our argument at this point is devoted to the following proposition: (a) The Court lacked the power to classify the roads and bridges or to rewrite the width limit as those are solely legislative functions, and (b) since the Court lacked such power it was required, under the record evidence and the applicable rules of law, to hold the entire Act valid as to all roads and bridges.

It is of course well settled that courts can not take over legislative functions, *Maxwell* v. *Moore*, 22 How. 185, 191. But it will no doubt be urged that this is no case of forbidden judicial legislation but is only an instance of the principle of severability of the valid in a statute from the invalid. Obviously there are only two ways in which the effect of a statute may be changed as the Court has changed the statute in the instant case: (1) either by purely legislative act, or (2) by judicial pronouncement of severability.

It is clear that the Court's action cannot be justified on the theory that it was declaring the statute partially invalid

and saving the remainder. The principle of saving part of a statute by holding it severable from an invalid part is of course familiar, but that principle has never been, and cannot properly be, extended to authorize the decree in this case. The rule of severability is applied in two ways. In the usual application some of the words in a statute are physically pared away to leave a valid act. The other way, rarely used, is that the original wording is left intact but the act is held to apply only to permissible objects.

Of course this second named manner of application is the only one that could prevail here, but a brief consideration of the law involved makes clear that it cannot be relied on to support the Court's action.

Where it is sought to leave the wording of a statute intact, but to limit its application to permissible objects, this can be accomplished only (a) where the statute in the same words includes both objects as to which the State has no power whatsoever to legislate and objects as to which it has such power, *and* (b) where an intention can be read into the statute that it is intended to be applied only to the permissible objects. Unless both of these elements are present the principle of severability cannot apply. *Singer Sewing Machine Co.* v. *Brickell,* 233 U. S. 304, 312-314, and cases cited.

It is manifest that the South Carolina Legislature (a) had power to enact a weight limitation statute applicable to *all* roads in the State, and (b) that it intended this particular statute to govern all such roads. Plainly the rule of severability cannot be invoked to justify the Court's decree taking out from under the statute 4 per cent of the roads.

The point of the foregoing is this: Since the Court's action cannot be justified by the principle of severability, the Court was doing nothing else but legislating, was forsaking its own proper judicial function and usurping the

legislative prerogative. It may be at once urged, however, that this discussion only demonstrates that the Court should have declared the statute invalid as to all roads, and that this Court should now do so. But that argument is entirely unsound, and wholly overlooks the principles which actually govern the case.

In the first place, the fundamental rule of law that should prevail here (assuming now for argument the District Court's premise that the statute is unreasonable as to the 2,417 miles plus the interspersed low type mileage) is the principle, announced in many cases, that a police power statute enacted to cover a general situation admittedly requiring regulation is not rendered invalid because in the necessarily broad general class there is a small marginal class which the statute burdens. This rule is explained and applied to situations similar to the one here involved in cases heretofore cited: *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365; *Purity Extract and Tonic Co.* v. *Lynch*, 226 U. S. 192; *Hebe Co.* v. *Shaw*, 248 U. S. 297; *Silz* v. *Hesterberg*, 211 U. S. 31; *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498; and *Holyoke Water Power Co.* v. *American Writing Paper Co.*, decided March 1, 1937, 81 L. Ed. (adv.) 383. This rule in itself demonstrates the validity of the statute and that the Court improperly indulged in legislation. That the marginal class is small is established by the fact, among others, that only one per cent of the trucks registered in South Carolina are registered to carry more than three tons of net load, and only .06 per cent to carry more than four tons of net load (R. 272).

In the second place, the point that the Court is powerless to legislate demonstrates the necessity of sustaining the action of the South Carolina Legislature. That is, if the District Court had understood that it was powerless to classify the South Carolina highways, it assuredly would have upheld the statute as applied to all highways. Putting

it another way, if the Court had held the Act invalid as to all highways and bridges there cannot be the least question but that its decree under the evidence would be reversed. *Sproles* v. *Binford, supra* (286 U. S. 374). And since it had no power to classify, the decree must be reversed and the Act held valid as to all roads and bridges of the State.

The above considerations also apply to the Court's action respecting bridges. An analysis of the decree makes it evident that the decree has made the carrying capacity of *each* bridge in South Carolina the subject of an individual judicial investigation. The effect of paragraph (2), (R. 85), is to open all bridges to truck traffic *with no restriction as to weight,* but the State Highway Department can close any bridge by posting a notice thereon; and in paragraph (5), (R. 86), the Court retains jurisdiction to conduct a hearing on the propriety of each notice. It is doubtful if American legal history contains an instance of mass assumption of legislative authority by the courts that even approaches this.

The Legislature, in the admitted scope of its authority made one weight limit for all of the bridges of the State. This was too generous for some weak bridges and is absolutely necessary for 75 per cent of the 50 miles of bridges on the State highway system, and it did, without question, open all bridges to *at least* 99.94 per cent of all of the trucks registered in the State when loaded to capacity (R. 272, 114, 229). Assuredly a law applicable generally to a class of objects cannot be nullified by the decision of a court that it will make each individual object covered by the statute a separate subject of judicial investigation.

These considerations also apply to the action of the Court in enjoining the 90 inch width limit on the designated highways in paragraph (1) of the decree, provided the width does not exceed 96 inches (R. 85), but this provision requires

some additional consideration of its own. Obviously the Court had no power to fix a new limit; this was not severing the valid from the invalid but was writing a new statute. It is important to observe that the Court recognized that some width limit is necessary; it felt it must not leave the door wide open as to width limits as it had done in the case of weight limits. *Therefore it is apparent that had the Court not been laboring under the erroneous theory that it could, in vacating one width limit, fix another, it would not have disturbed the 90 inch limit fixed by the Legislature, for a difference of only 6 inches.*

Now it may be argued against the above that *this* Court should simply declare the width limit invalid and stop at that. But that is entirely unsound. That would be neither to affirm nor reverse the decree, but it would be to enter a new decree not justified by the evidence nor by any principles of law.

The Court thus applied as a test of reasonableness of the statute not the correctness of the legislative judgment as to *all* of the roads, nor its own judicial reasoning based on a consideration of the proper sphere of the judicial function; but the test the Court did apply was what it might have done had it been a member of the Legislature. These considerations alone require reversal.

Conclusion.

For all of the foregoing reasons, which are summarized in the subject index, and in the summary of argument on page 34 hereof, it is respectfully submitted that the Act here in question should be declared constitutional as to all of the roads and bridges of the State, and that the decree of the District Court should be reversed and the injunction dissolved. We believe this result is required by settled

principles of law announced by the decisions of this Court, which we have cited.

Respectfully submitted,

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APPENDIX I.

South Carolina Acts, 1933—Act No. 259, Page 340.

AN ACT to Regulate and Limit the Use of the Public Highways in the State by Motor Trucks, Semi-Trailer Motor Trucks, Semi-Trailers and Trailers; to Enlarge the Powers of the State Highway Department and Other Bodies Having Like Jurisdiction and Incorporated Cities and Towns in Respect Thereof; to Provide for the Enforcement of this Act and to Prescribe Penalties for the Violation Thereof and Exempting Certain of Such Motor Trucks, Semi-Trailer Motor Trucks, Semi-Trailers and Trailers From the Provisions Hereof, or Certain of Such Provisions, and to Repeal All Laws Inconsistent With This Act.

SECTION 1. *Public Policy.*—Be it enacted by the General Assembly of the State of South Carolina: It is hereby declared to be the public policy of this State that heavy motor trucks, alone or in combination with other trucks, increase the cost of highway construction and maintenance, interfere with and limit the use of the highways for normal traffic thereon, and endanger the safety and lives of the traveling public, and that the regulations embodied in this Act are necessary to achieve economy in highway costs, and to permit the highways to be used freely and safely by the traveling public.

SECTION 2. *Definitions.*—When Used in This Act: "Motor trucks" means any motor propelled vehicle designed or used for carrying freight or merchandise and not operated or driven on fixed rails or tracks; but it shall not include self-propelled trucks designed primarily for passenger transportation, though equipped with frames, racks or bodies having a load capacity not exceeding 1,500 pounds.

"Semi-Trailer Motor Trucks" means any motor-propelled truck, not operated or driven on fixed rails or tracks, designed to draw, and to support the front end of a semi-trailer. The tractor (or motor propelled truck), together with the semi-trailer shall be considered one unit, and

the words, "Semi-trailer motor truck" as used in this Act, shall mean and embrace such entire unit. Provided, That nothing contained herein shall alter or be construed to alter existing law in respect to the licensing of semi-trailer trucks, whereby the motor unit and the trailer unit are considered independent units and a license is issued to each separately.

"Semi-Trailer" means a vehicle designed to be attached to, and having its front end supported by, a motor truck or motor truck tractor, and intended for the carrying of freight or merchandise and with a load capacity of over 1,500 pounds, except farm wagons used as trailers.

"Trailer" means any vehicle designed to be drawn by a motor truck, but supported wholly upon its own wheels, and intended for the carriage of freight or merchandise.

"Persons" shall include individuals, partnerships, associations, trusts and corporations, and the receivers, assignees or agents of any of them.

"Highways" shall include any public road, street, avenue, alley or boulevard, bridge, viaduct or trestle and the approaches thereto, within the limits of the State of South Carolina.

"Department" shall mean the State Highway Department of South Carolina.

"Local Authorities" shall mean every county, municipal and local board or body having jurisdiction over, and responsibility for the maintenance of, any highway other than state highways.

SECTION 2a. *Operation on Highways.*—Any person operating a motor truck, semi-trailer or other motor truck combination on or along any State highway shall, at all times, operate such vehicle to right of the center of said highway, so that the entire vehicle, including its load, shall be, at all times to the right of the center of said highway, except while overtaking or passing other vehicles traveling in the same direction. Any person operating a motor truck, semi-trailer or other motor truck combination shall not overtake or pass a vehicle traveling in the same direction when the view of the over-taking vehicle is in any way obscured, or when the vehicle to be overtaken is approaching the crest of a hill or rounding a curve.

SECTION 3. *Trailers.*—No person shall use or operate any trailer, as defined by this Act, on any highway.

SECTION 4. *Weight.*—No person shall operate on any highway any motor truck or semi-trailer whose gross weight, including load, shall exceed 20,000 pounds.

SECTION 5. *Height.*—No person shall operate on any highway any motor truck or semi-trailer motor truck whose height, including any part of the body or load, shall exceed 12 feet 6 inches, but nothing herein contained shall be construed to require the public authorities to provide sufficient vertical clearances to permit the operations of trucks with a height of 12 feet 6 inches.

SECTION 6. *Width.*—No person shall operate on any highway any motor truck or semi-trailer motor truck whose total outside width, including any part of body or load, shall exceed 90 inches.

SECTION 7. *Length.*—No person shall operate on any highway any motor truck or semi-trailer truck, the overall length of which, including load, is in excess of 35 feet. This Section shall not apply to trucks or semi-trailer trucks engaged in the transportation of lumber and logs from the mill or forest to shipping points, or from forest to mill or consumer.

SECTION 8. *Reduced Load and Speed Limits.*—(a) The State Highway Department and local authorities may, upon proper showing, issue special permits, which shall apply to roads or highways under their separate jurisdiction and supervision, for the operation of trucks, the operation of which would otherwise be prohibited under the provisions of this Act, subject to the following conditions:

(1) Any permit under the authority of this Section shall be in writing, which shall at all times be carried in the vehicle operating under the authority thereof, and shall contain such other and further restrictions as deemed necessary in the discretion of the issuing authority.

(2) Permits issued under the authority of this Section by the State Highway Department shall include authority

for the operation of such through any municipality on or along the street generally used on such highway route.

(b) County road authorities and municipal road authorities, in respect to roads under their sole supervision, may prohibit or limit the use of such roads by reducing the limitations fixed by this Act, if, in their discretion, such additional restrictions are proper and necessary; Provided, however, That on any road or street upon which such limitations shall apply there shall be conveniently and conspicuously posted such further restrictions showing the permitted maximum limits (weight, length and height) permitted over such thoroughfares. Provided, further, That no limitations shall be established by any county, municipal or other local authorities pursuant to the provisions of this Section that would interfere with or interrupt traffic as authorized hereunder over State Highways, including officially established detours for such highways, including where such traffic passes over roads, streets or thoroughfares within the sole jurisdiction of such county, municipal or other local authorities, unless such limitations and further restrictions shall have first been approved by the State Highway Department.

SECTION 9. *Exemptions.*—(a) The provisions of this Act shall not apply to motor trucks, semi-trailer motor trucks or trailers, owned by any agency of, the United States, the State of South Carolina, or any county or city or incorporated town therein, nor the equipment used only in husbandry, such as harvesting machines, threshers, and binders constructed so that they can be moved or propelled on the public highways.

(b) The State Highway Department, County Highway authorities, and municipal authorities may each issue special permits applying respectively to State Highways, County Highways and streets of municipalities, for the transportation of such over-size, over-weight, or over-length commodities as cannot reasonably be dismantled, and for the operation of such over-weight or over-size trucks, whose gross weight, including load, height, width or length, may exceed the limits prescribed in this Act, as may reasonably

be necessary for the transportation of such commodities, but such permits shall be issued subject to the following conditions:

(1) Any permit issued by the State Highway Department, or county road authorities, for the operation of a truck failing to come within the limits established by this Act or other limits already fixed by law, shall be in writing and shall be limited to one trip of the truck authorized to be moved or operated, as well as to the roads which are to be traversed by the said truck. Any such permit shall contain such further restrictions as in the discretion of the issuing authorities may seem appropriate.

3) (Apparently misnumbered) In the case of any truck operated under the terms of any permit contemplated by this section, whether the same be issued by the State Highway Department, county road authorities or by municipal authorities, the operator shall carry in the said truck the permit for such operation so that it may be available at any time for public inspection.

(4) The operation of any motor vehicle, semi-trailer, or trailer in violation of the terms of any such permit, shall constitute a violation of this Act.

(5) Provided, That any permit issued by the State Highway Department shall give the holder thereof the right of passage over any part of the State Highway System, and all officially established detours thereof, including streets, roads and thoroughfares within the limits of any county, municipality or other local authority that are customarily used as a part of the State Highway System.

(c) The provisions of this Act shall not apply, prior to December 31, 1934, to any motor truck, semi-trailer, or trailer, which has been registered and on which has been paid the annual registration fee as provided, by the law of this State, before the date upon which this Act shall become effective, but shall, as to such trucks, be and become in full force and effect on and after December 31, 1934.

(d) The provisions of this Act shall not apply to telephone, telegraph or electric power companies, hauling by

means of their own vehicles, their own materials and equipment for construction or maintenance of their own property.

SECTION 10. *Penalties.*—The operation of any motor truck, semi-trailer motor truck or trailer, in violation of any section of this Act, or of the terms of any special permit issued hereunder shall constitute a misdemeanor, and the owner thereof, if such violation was with his knowledge or consent and the operator thereof shall on conviction be fined not more than Fifty ($50.00) Dollars, or imprisoned for not more than thirty (30) days.

(This Section as printed in the official bound volume of the South Carolina Acts, 1933, is in part misprinted and the above language of the Section is taken from an official copy of the statute filed in the office of the Secretary of State.)

SECTION 11. *Enforcement.*—Any officer hereinafter in Section Twelve enumerated, having reason to believe that the height, length, width or weight of any motor truck, semi-trailer motor truck or trailer, is in excess of the maximum limits prescribed by this Act permitted by any special permit issued under the terms hereof, is authorized to measure or weigh the same, either by means of portable or stationary scales, in the event such scales are on the route of said vehicle. Said officer shall require the operator of said motor truck, semi-trailer motor truck or trailer, to unload immediately such portion of load as may be necessary to decrease the gross weight of such vehicle to the maximum gross weight permitted by this Act or by the terms of any special permit in the possession of such operator and issued under the provisions of Section 9 (b) hereof (which excess load, when unloaded, shall be at the sole risk of the owner). The refusal of any such operator to permit his motor truck, semi-trailer motor truck or trailer to be measured or weighed or to proceed to a stationary scale, or to unload the excess load, shall constitute a violation of this Act.

SECTION 12. *Enforcement—Officers—Powers and Duties—Rights of Accused.*—Any peace officers, including sheriffs and their deputies, constables, police officers and marshals

of cities or incorporated towns, county police or patrols, State or County license inspectors and their deputies, and special officers appointed by any agency of the State of South Carolina for the enforcement of its law relating to motor trucks, now existing or hereafter enacted, shall be authorized, and it is hereby made the duty of each of them to enforce the provisions of this Act and to make arrests for any violation or violations thereof, and for violations of any other law relating to motor trucks, without warrant if the offense be committed in his presence, and with warrant if he does not observe the commission of the offense. When in pursuit of any offender for any offense committed within his jurisdiction, any such officer may follow and effect an arrest beyond the limits of his jurisdiction. If the arrest be made without warrant, the accused may elect to be immediately taken before the nearest court having jurisdiction, whereupon it shall be the duty of the officer to so take him. If the accused elect not to be so taken, then it shall be the duty of the officer to require of the accused a cash bond in a sum of not less than $25.00 for which the officers shall give a receipt stating the time and place where and when the accused is required to appear; conditioned that the accused binds himself to appear in the nearest court having jurisdiction at the time fixed in the bond. In case the arrested person fails to appear on the day fixed, the bond shall be forfeited in the manner as is provided for the forfeiture of bonds in other cases.

SECTION 13. *Severability.*—If any provision of this Act is declared unconstitutional or void for any reason or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and the applicability of such provisions to other persons and circumstances shall not be affected thereby. It is the intention of the General Assembly that, if this Act cannot take effect in its entirety because of the judgment of any court of competent jurisdiction holding unconstitutional or void for any reason any provision or provisions thereof, the remaining provisions shall be given full force and effect as completely as though the provision or provisions held unconstitutional or void had not been included in this Act.

SECTION 14. *Repeal Provision.*—All laws, or clauses of laws, in conflict, or inconsistent, with the provisions of this Act, to the extent of such conflict or inconsistency are hereby repealed.

SECTION 15. This Act shall take effect upon its approval by the Governor.

Approved the 28th day of April, 1933.

APPENDIX II.

Acts S. C., 1931—Statutes at Large, No. 575.

AN ACT to Create a Commission for the Purpose of Investigating Motor Transportation in South Carolina; and to Report to the Next General Assembly.

SECTION 1. *Commission to Investigate Motor Transportation—When to Report.*—Be it enacted by the General Assembly of the State of South Carolina: That there is hereby created a Commission of five members for the purpose of thoroughly investigating the question of motor transportation of freight and/or passengers in South Carolina, which said Commission shall report its findings and recommendations to the next session of the General Assembly of South Carolina.

SECTION 2. *Members—Appointments.*—That said Commission shall consist of two members of the State Highway Commission, two members of the Railroad Commission of South Carolina, to be appointed by the Chairman of the Railroad Commission of South Carolina, and one member of the South Carolina Tax Commission, to be appointed by the Chairman of the South Carolina Tax Commission; that said Commission shall organize by selecting one of its members Chairman.

SECTION 3. *Authority of Commission.*—That said Commission is hereby clothed with full authority to subpœna

witnesses and administer oaths, and to require the production of any and all documents, books, and records of whatever kind and nature pertaining to the question of motor transportation and/or the costs of motor transportation and/or taxes upon motor transportation as compared with the costs and taxes of railroad carriers in South Carolina. That the report of said Commission to be made to the General Assembly of 1932, shall include full findings of fact, together with recommendations and suggested legislation, preferably in the form of bills.

SECTION 4. *Compensation of Members—Employ Clerical Help—Limit of Expenses.*—That the members of said Commission for their services shall be paid actual traveling expenses incurred in the discharge of their duties hereunder, which said sum shall be paid as now provided by law for members of the two respective Commissions. That said Commission is hereby authorized and empowered to employ such stenographic and auditing assistance as may be necessary for the proper discharge of the duties of said Commission, and that the expenses of the same shall be paid upon proper vouchers from funds collected by the Railroad Commission of South Carolina in administering the Motor Transportation Act: *but, Provided, however,* That the total expense of this investigation shall not exceed the sum of Five Thousand ($5,000.00) Dollars.

SECTION 5. All Acts or parts of Acts inconsistent herewith are hereby repealed.

SECTION 6. This Act shall take effect upon its approval by the Governor.

Approved the 27th day of June, 1931.

APPENDIX III.

Acts of South Carolina, 1920—Statutes at Large, Volume 31, pps. 1072, 1078.

ACT No. 602.

AN ACT to Create a State Highway Department, to Define Its Duties and Powers, to Provide Funds for Its Maintenance by the Licensing of Motor Vehicles Operated on the Highways of the State, to Raise Revenue for the Construction and Maintenance of a System of State Highways, and to Assent to the Provisions of an Act of Congress, Approved July 11, 1916, Entitled "An Act to Provide That the United States, Shall Aid the States in the Construction of Rural Post Roads and for Other Purposes," and All Acts Amendatory thereto.

SECTION 13. *License Fees After January 1, 1921—Limitations on Weight of Trucks—Penalty for Violation—Dealer's License—Transfer of License.*—On and after January 1st, 1921, every resident owner of a motor vehicle in the State of South Carolina shall pay to the State Highway Commission, in lieu of all other State, municipal or county licenses, an annual license as follows: For each automobile weighing not over two thousand pounds the sum of six ($6.00) Dollars, and for each additional five-hundred pounds of weight, or fraction thereof, the additional sum of two ($2.00) dollars. The manufacturer's weight of automobiles shall be accepted as the weight for the purpose of registration hereunder. And for trucks the license fees shall be as follows: Trucks of a capacity not exceeding one ton, fifteen ($15.00) dollars. Trucks exceeding one ton and up to and including two tons, thirty ($30.00) dollars. Trucks exceeding two tons and up to and including three tons, sixty ($60.00) dollars. Trucks exceeding three tons and up to and including four tons, one hundred ($100.00) dollars. Trucks exceeding four tons and up to and including five tons, two hundred ($200.00) dollars. Trucks exceeding five tons and up to and including six tons, two hundred and fifty ($250.00) dollars. Trucks exceeding six tons and up to and including seven and over, three hundred and fifty

($350.00) dollars; Provided, That a reduction of twenty-five (25) per cent. on the license be allowed on all trucks using pneumatic tires on all the wheels. Lumber trucks, and other trucks with trailer attached, shall pay an annual license of $5.00 for each trailer so operated, and an additional sum of $2.00 for every thousand pounds or part thereof of ordinary loading capacity of such trailer: Provided, That no truck larger than a four ton truck shall be allowed to be used on any highway or public road of this state unless the person desiring to operate any such truck larger than a four ton truck shall first make a petition to the authorities in charge of the roads in any county where it is proposed to operate such truck, stating the road or roads proposed to be used, and such road authorities shall consent to the use of such truck on such roads, and such consent shall be approved by the State Highway Engineer, in which event such truck shall, upon payment of the license fee herein provided, be permitted to operate on the roads stated in the petition and none other; any violation of the provisions of this proviso shall be punished as herein provided in Section 15 of this Act. For each motor cycle, three ($3.00) dollars per annum. Every dealer in motor vehicles in this state, before operating any such motor vehicles upon the highways of this State for the purpose of demonstration and sale, shall pay to the State Highway Commission of this State, in lieu of all other State, municipal and county licenses, an annual license of twenty-five ($25.00) dollars for the first make of motor vehicles sold by such dealer, and an additional annual license fee of fifteen ($15.00) dollars for each other make of motor vehicle sold by such dealer. All licenses shall expire on the thirty-first day of December following the date of issue. Annual licenses shall hereafter be issued between the first day of January and the first day of February of each year. In the case of motor vehicles registering for the first time, the full annual fee shall be paid for licenses issued between January the first and March the thirty-first; three-fourths of the annual fee for licenses issued between April the first and June thirtieth; one-half of the annual fees for licenses issued between July first and September thirtieth; and one-fourth

of the annual fees for licenses issued between October first and December thirty-first. Any owner of a motor vehicle upon which the license fee for the then current year shall have been paid shall, upon the sale of said motor vehicle notify the State Highway Department of such sale, giving the name and address of the purchaser, and upon the payment of a transfer fee of fifty (50¢) cents the original license shall be transferred to the new owner. The State Highway Commission shall furnish the Clerk of Court of each County with a sufficient supply of application blanks for license for use of the people of the county.

APPENDIX IV.

Acts of South Carolina, 1924—Statutes at Large, Volume 33, Act. No. 721, Page 1182.

No. 721.

AN ACT to Regulate Traffic Upon the Highways of The State, and to Provide Penalty for Violation Thereof.

SECTION 1. *Limit of Weight and Load for Vehicles on Highways—Measurement.*—Be it enacted by the General Assembly of the State of South Carolina: That from and after the passage of this Act, it shall be unlawful to operate on any of the highways or public roads of this State whether such roads are in the State system or not, any vehicle of four wheels or less the gross weight of which, including its load, is more than twenty thousand pounds, or to operate any vehicle having a greater weight than fifteen thousand pounds on any one axle, or having a load of over six hundred pounds per inch width of wheel concentrated upon the road surface (said width in case of pneumatic tires to be measured between the flanges of the rim and in case of solid rubber tires to be the actual width of said tires.)

APPENDIX V.

Acts of South Carolina, 1930, Statutes at Large, Volume 36, Pages 1192-1193.

"No. 685.

"AN ACT to Limit the Weight, Size and Loads of Vehicles Operated on Public Highways of This State and to Provide Penalties for Violations.

"3. *Weight-Limit-Distribution—This Section Additional to Act No. 543, Acts of 1926—Hauling of Cotton.*—

"Except as authorized in Section four hereof, no vehicle, whether operated singly or in combination with other vehicles on the public roads of this State, shall exceed in gross weight twelve and one-half (12½) tons, and the gross weight on no axle of any vehicle or combination of vehicles, having more than two axles, shall exceed five (5) tons. Any vehicle having more than two axles shall be so designed and constructed as to assure a constant distribution of weight among the axles while such vehicles are in operation, regardless of irregularities in the road surface. No combination of vehicles operated as a unit on the public roads of the State shall have a gross weight exceeding twenty (20) tons: *Provided,* That this Section shall not serve to repeal any provisions of Act No. 543, Acts of 1926, but shall be construed as provided additional limitations: *Provided,* That the limitations as to width of loads as stated in this Section and in Section 2 of this Act, shall not be deemed to prohibit the hauling of bales of cotton in loads not exceeding the width of two bales lying or standing edge to edge, if the bales are touching each other at both ends. It shall be lawful to haul cotton on the public highways of the State where the width of the load does not exceed the width of two bales placed edge to edge, against each other."

APPENDIX VI

Summary of Proceedings, Fourth National Conference on Street and Highway Safety, May 23, 24, 25, 1934.

Act V—Uniform Act Regulating Traffic on the Highways, Article XVI—Size, Weight and Load, pp. 37-8.

SEC. 146. Gross weight of vehicles and loads. 11 (a) No vehicle or combination of vehicles shall be moved or operated on any highway or bridge when the gross weight thereof exceeds the limits specified below:

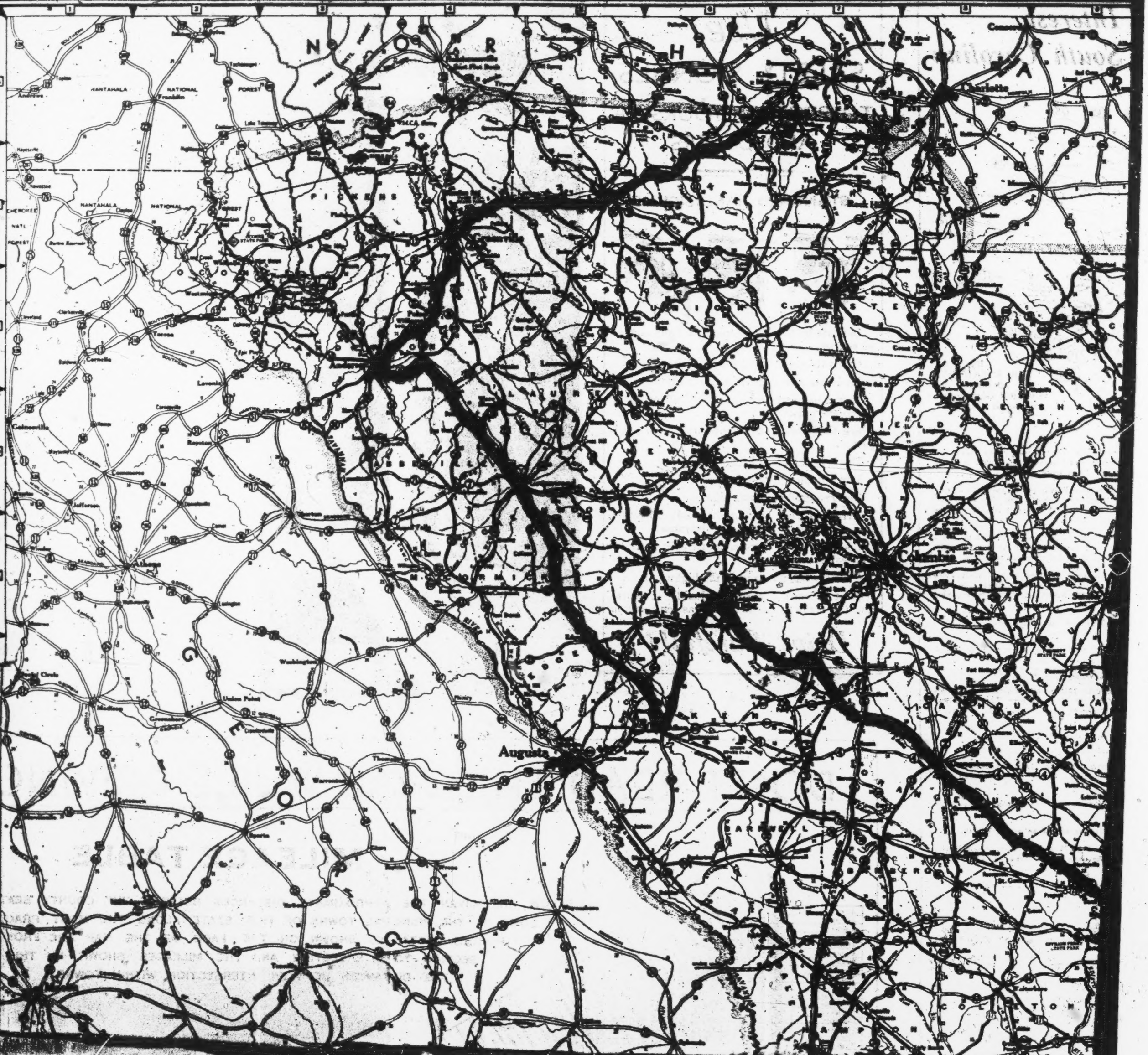
1. The gross weight upon any one axle of a vehicle shall not exceed the limits prescribed in section 145 of this Act.
2. Subject to the limitations prescribed in section 145 of this Act the gross weight of any vehicle having two axles shall not exceed — pounds.
3. Subject to the limitations prescribed in section 145 of this Act the gross weight of any single vehicle having three or more axles shall not exceed — pounds.
4. Subject to the limitations prescribed in section 145 of this Act the gross weight of any combination of vehicles shall not exceed — pounds.

(b) The Commissioner, upon registering any vehicle under the laws of this State which vehicle is designed and used primarily for the transportation of property or for the transportation of 10 or more persons, may require such information and may make such investigation or test as necessary to enable him to determine whether such vehicle may safely be operated upon the highways in compliance with all the provisions of this Act. He shall register every such vehicle for a permissible gross weight not exceeding the limitations set forth in this Act. Every such vehicle shall meet the following requirements:

1. It shall be equipped with brakes as required in section 124 of this Act.
2. Every motor vehicle to be operated outside of business and residence districts shall have motive power adequate to propel at a reasonable speed such vehicle and any load thereon or to be drawn thereby.

(c) The commissioner shall insert in the registration card issued for every such vehicle the gross weight for which it is reigstered, and if it is a motor vehicle to be used for propelling other vehicles he shall separately insert the total permissible gross weight of such motor vehicle and other vehicles to be propelled by it. He may also issue a special plate with such gross weight or weights stated thereon, which shall be attached to the vehicle and displayed thereon at all times. It shall be unlawful for any person to operate any vehicle or combination of vehicles of a gross weight in excess of that for which registered by the commissioner or in excess of the limitations set forth in this Act.

11. In view of the varying conditions of traffic, and lack of uniformity in highway construction in the several States, no uniform gross weight limitations are here recommended for general adoption throughout the country. For the protection of bridges, the American Association of State Highway Officials recommends the following formula: $W = 700\ (L + 40)$ where $W =$ the gross weight in pounds and L equals the length in feet between the centers of the first and last axles of a vehicle or combination of vehicles.



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Jefferson
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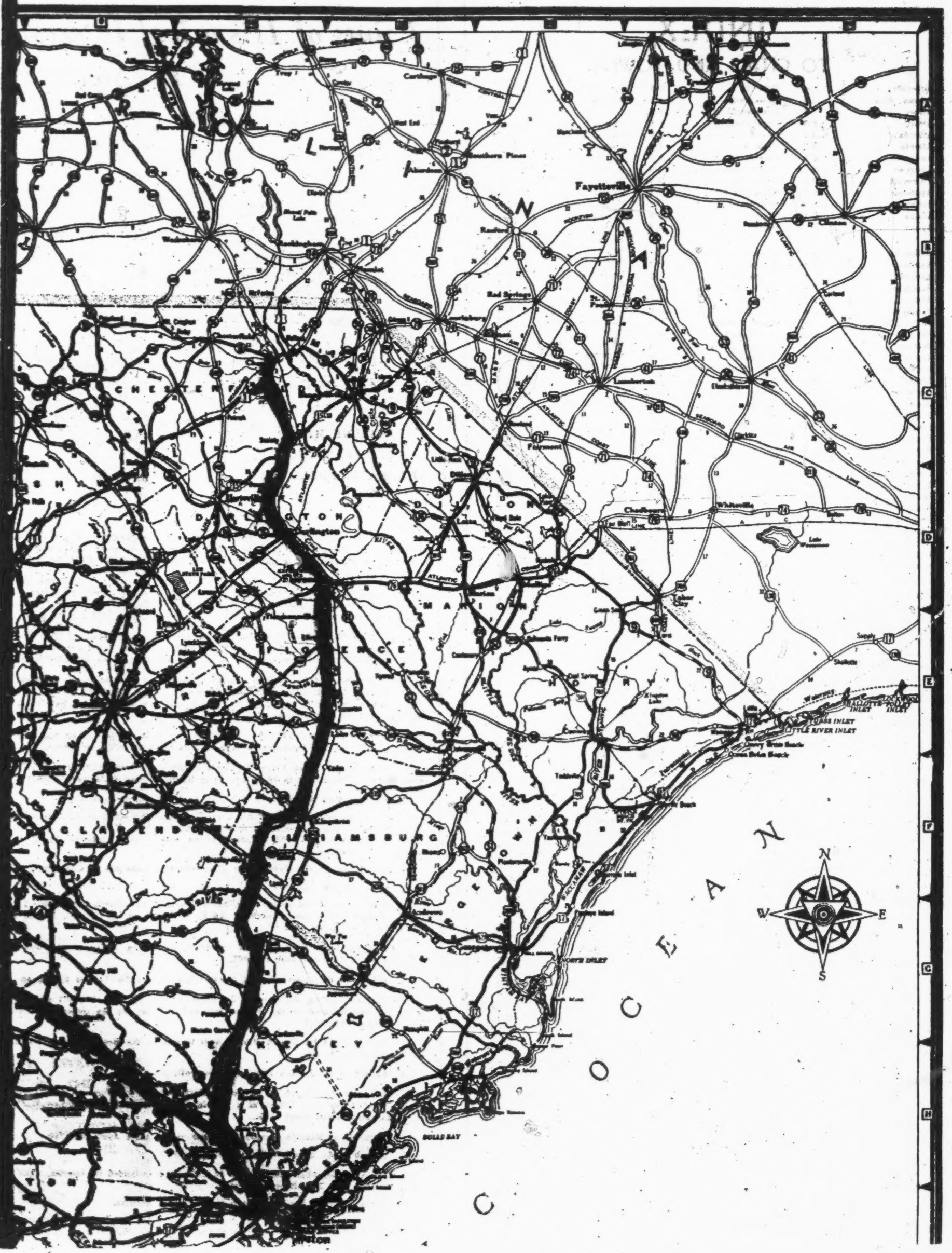
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Aynor
Socastee
Longs
Calabash
Ocean Drive Beach
Little River Inlet
Tabbs Inlet
Mullets Inlet
Murrells Inlet
North Inlet
Winyah Bay
Bulls Bay
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Waccamaw River
Lynches River
Black River
Santee River
Great Pee Dee River
Little Pee Dee River
Lumber River
Cape Fear River
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Little Shoe Heel Creek
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Lake Swamp
Juniper Swamp
Green Swamp
Jones Swamp
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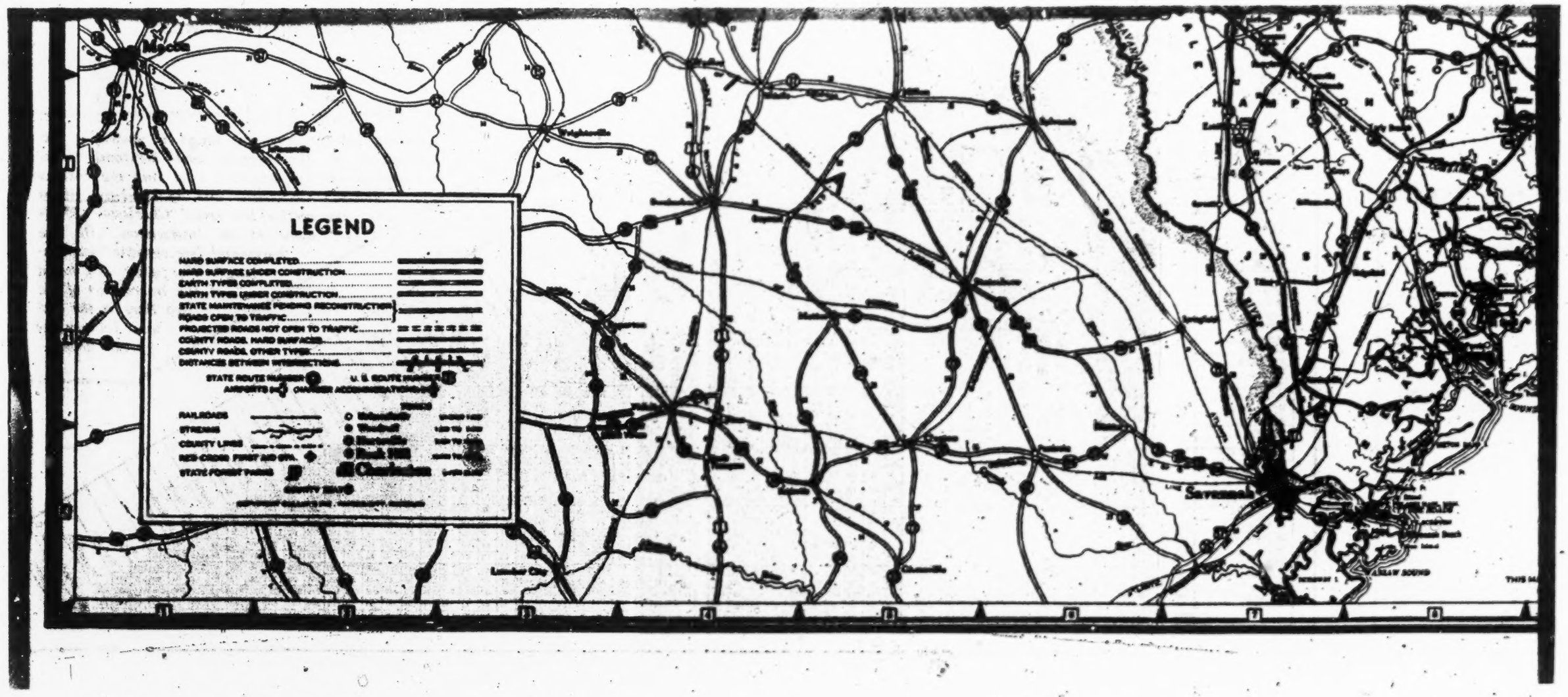
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COUNTY ROADS, OTHER TYPES
DISTANCES BETWEEN INTERSECTIONS
STATE ROUTE NUMBER
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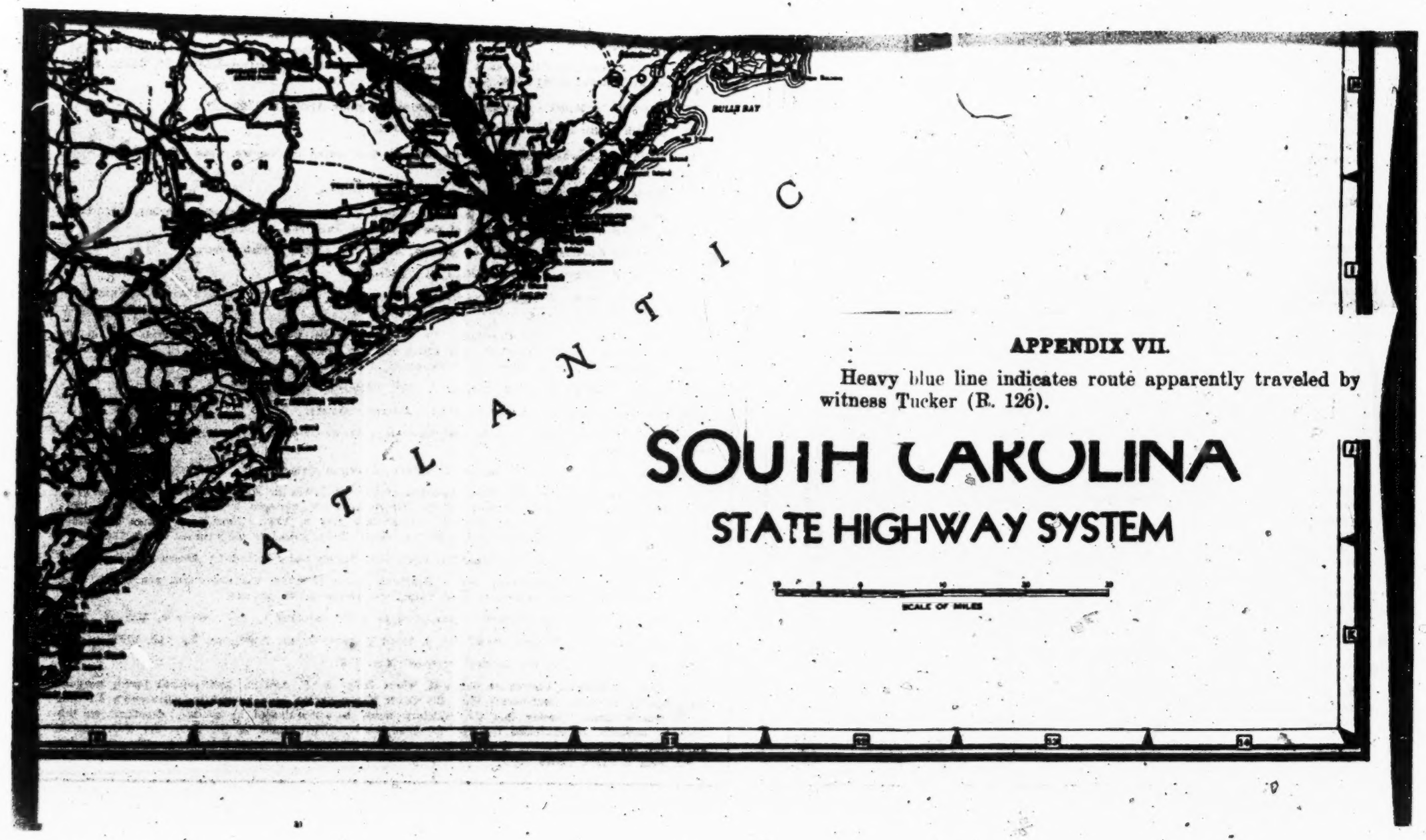

APPENDIX VII.

Heavy blue line indicates route apparently traveled by witness Tucker (R. 126).

SOUTH CAROLINA

STATE HIGHWAY SYSTEM

Supreme Court of the United States

OCTOBER TERM, 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION ET AL., APPELLANTS,

versus

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

REPLY BRIEF OF THE STATE OF SOUTH CAROLINA AND ITS OFFICIALS, ORIGINAL DEFENDANTS, APPELLANTS

REASONS FOR FILING REPLY BRIEF

There is no purpose here to re-argue any of the points of our original brief, or to state any new points. The reasons for filing this reply brief are these: (1) Appellees' brief contains several erroneous statements as to the Record on important points, which we undertake to point out. (2) Appellees have really argued only one (Part IV) of the principal points made by appellants; otherwise they have in the main apparently misapprehended appellants' positions and then directed their argument to such erroneously assumed

issues. A prompt understanding of the real issues may be promoted by calling the Court's attention to this. (3) At numerous places the meaning of decisions of this Court are erroneously stated, according to our understanding of such decisions.

From page 10 to page 54 appellees purport to outline the history of highway transportation, including as a part of such history the enactment of the Federal Highway Act (Sections 1 to 56, Title 23 U. S. C.), and the Motor Carrier Act, 1935 (Sections 301 to 327, Title 49 U. S. C.). Appellees infer, from this history and from the enactment of these statutes, that some new limitation upon state police power over public highways has been created, although appellees admit that the Federal Acts do not actually supersede state power.

On the contrary, however, we submit that in the light of this history, if any effect may be attributed to the two Federal Acts, it is more definitely to confirm this police power in the states, and to show plainly the intention of Congress not to interfere with such power.

It should be noted that the 90 inches width limitation is the only width limit which has ever been prescribed by the law of South Carolina. It has been in effect since 1920. Act No. 602, South Carolina Acts of 1920, 31 Stats., at pages 1072, 1075, Section 9, set out as Appendix I hereof. In 1933 the weight limitation in question was enacted in the law and before that comparable weight limitation laws had been enacted in other states, including Texas, Kentucky and Tennessee. Although by Section 19 of the Federal Highway Act (Section 19, Title 23 U. S. C.), the Secretary of Agriculture is authorized to make such recommendations to the State Highway Department "as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon," the

record does not show that any specific recommendation pertaining to the size or weight of motor vehicles which should be authorized to operate on South Carolina highways has ever been made to the South Carolina highway department by the Secretary of Agriculture or any of his subordinates. Appellees refer to the maximum limitations recommended by the American Association of State Highway Officials, but obviously these limitations were adopted as recommended standards for future construction of highways. Highway engineers engaged in the construction of public roads are necessarily concerned with the design (including thickness) of the concrete roads they are expected to build. Due to the obvious relationship between the roads themselves and the loads they are expected to support, it was essential that some weight limitation be recommended so that the design engineer might have some maximum beyond which he need make no provision. The only witness for the United States Bureau of Public Roads, L. W. Teller, conceded that he knew nothing of South Carolina highways, their surfacing or capacity, other than the concrete roads to which he referred. Clearly, limitations for the protection of roads, as contrasted with the design of roads, would not be made without study or knowledge of the roads which such limitations were intended to protect.

Further, the record shows that the Secretary of Agriculture, through the Bureau of Public Roads, has never withheld any Federal aid funds from South Carolina or other states in which comparable weight limitations exist (R. 252-253); he has on the contrary approved the expenditure of Federal aid funds in South Carolina for the improvement of 1805.5 miles of highways with types of surface as to which the District Court itself found the 20,000 pounds weight limitation reasonable. Such mileage comprises almost two-thirds of the total mileage of 2797.8 in the state improved with Federal aid (R. 253).

Appellees cite the Motor Carrier Act, 1935, as the basis for contending that Congress intended to include interstate commerce by motor truck as part of the commerce intended to be promoted by the Federal Highway Act and such Motor Carrier Act. Attention is respectfully called to the fact that if interstate commerce by motor truck was intended to be promoted by the Congress through such Motor Carrier Act, there was no intent to promote truck commerce by the use of vehicles of any specific size or weight. Such Act was passed in August, 1935. It did not attempt to fix or authorize the Interstate Commerce Commission to fix the sizes or weights of motor vehicles. The only mention of the subject is at paragraph 225 (Section 325, Title 49 U. S. C.), in which

> "* * * the Commission is hereby authorized to investigate and report on the need for Federal regulation of the sizes and weights of motor vehicles and combinations of motor vehicles."

Furthermore, Thomas H. MacDonald, Chief, U. S. Bureau of Public Roads, in direct charge of the administration of Federal action pursuant to such Federal Highway Act, explains the intent and purpose of Federal aid highways to be something entirely different from that contended for by appellees and inferred by lengthy history of highway transportation set forth in appellees' brief. On April 28, 1936, at the 24th Annual Meeting of the Chamber of Commerce of the United States, in a public address by him, he said:

> "The real primary function of the highways, to me, is a local one. We have never held that highways ought to attempt to compete in the long distance shipment or travel, except in the recreational way, or with the air lines or with shipping. We feel that the highway is in a major way a local facility and as such fits into that category primarily."

If, as appellees urge, vehicles weighing more than 20,000 pounds are essential for the conduct of long distance interstate transportation by motor truck and if concrete paving is essential to accommodate vehicles of such greater weight, as the record clearly shows, the fact that Federal funds have been freely used in the construction of pavement surfaced with materials other than concrete indicates that the commerce intended to be promoted by the Congress was not long distance traffic by trucks heavier than 20,000 lbs. The above statement by the Chief of the U. S. Bureau of Public Roads corroborates this reasonable deduction.

Furthermore, it is submitted that if the history of highway transportation demonstrated (a) the actual obstruction thereto, (b) and the abhorrence for such obstruction on the part of the public and the Federal Government, which appellees would have us believe, then action would have been taken to correct the situation. *Sproles v. Binford*, 286 U. S., 374, was decided on May 23, 1932, and the Act in question has been in effect since 1933, yet no action has ever been taken by Congress to repeal the effect of that decision or to curtail the power of the State of South Carolina. On the contrary, Federal funds are still being used to construct highways surfaced with pavement other than concrete.

At page 54, and following, and elsewhere, appellees refer to the "disastrous burden" which the South Carolina Act will impose upon interstate commerce. At page 137, appellees say:

> "The decisions of the Court in *Morris v. Duby, supra*, and *Sproles v. Binford, supra*, reveal that in neither of these cases was there, **first**, a finding that the State regulations had exceeded the reasonable necessities of the State, and, **second**, that the burden imposed upon interstate commerce was substantial and amounted to a practical prohibition."

We submit that in the instant case there is no proper finding that the regulations in question exceed the reasonable necessities of the State of South Carolina. But passing, for the moment, the **first** subdivision of the above, we direct attention to the **second**. We pointed out in our first brief (So. Car. pp. 38-39) that an examination of the record on file here in the *Sproles case* shows that the Texas statute fixing a 7,000 pounds net load limitation interfered with interstate commerce by motor truck to at least as great a degree as the South Carolina Act. The District Court made extensive findings of fact showing such interference, but held the same immaterial as a matter of law. This Court in reviewing the District Court's findings in the Sproles case said (286 U. S., at 383-384):

> "The District Court made comprehensive findings. These set forth the various interests of the complainant and interveners (common carriers and contract carriers, in intrastate and interstate commerce, and manufacturers and distributors of commodities), their large investments, the extent of their operations in highway transportation, the character and uses of their equipment, and the losses to which they would be subjected by requirements of the statute."

The effect of the Texas Act is in the District Court opinions briefly detailed in 52 Fed. (2nd), 730, and 56 Fed. (2nd), 189. We submit that there is no basis for the continued insistence by appellees that the instant case is unique as to the showing of interference with interstate commerce. *Sproles v. Binford* showed at least as much burden upon or interference with interstate commerce of the identical kind and character present in the instant case.

On page 55 appellees refer to the facts stated on page 120 of our main brief, that of the 30,497 trucks registered in South Carolina in 1936 only 328 (or about 1 per cent.) were licensed to carry more than three tons of net weight, and of this 328 only 19 (about .06 per cent.) were licensed

to carry more than four tons of net weight. (This shows a further striking similarity between the instant case and *Sproles v. Binford,* see 286 U. S. at 384.) The trucks licensed to carry not more than three tons will not weigh, with load, 20,000 pounds (R. 114; and see footnote at 286 U. S., 389).

Our point is that if there were a demand for heavy duty trucks it would be reflected in truck registration. Appellees make two answers to this. The first seems to be that "these registered figures do not reflect the true capacity of interstate vehicles." This may be intended to mean that the true carrying capacity of interstate vehicles is not actually registered. It is to be noted that the District Court made no finding as to the **number** of vehicles used in interstate commerce; nor did appellees' bill make any allegations along that line. Hence the Record is silent as to the **number** of vehicles referred to in the 85 to 90 per cent. described in Finding of Fact No. 7.

Appellees' second answer is that—

> "Appellants' use of these registration figures ignores the fact, as shown throughout the evidence, that by far the greater number of vehicles using the interstate highways into, from and across the State of South Carolina would be registered not in that State but in North Carolina and other States where their owners are resident."

In the first place, we are unable to find any evidence to support that statement and appellees fail to cite any Record reference to that effect. In the second place, a non-resident operating motor trucks for hire on the South Carolina highways in interstate commerce is required by South Carolina law to register his vehicles in South Carolina. Indeed, the appellees, in their complaint, cite the statute that requires such registration, and allege that such statute is applicable to them, although six of the seven appellees who are carriers

for hire (R. 12 to 14) are not residents of South Carolina (R. 2 to 3), all of which we will point out. The Act * referred to is the Act regulating motor carriers for hire, and is incorporated in the Code of Laws of South Carolina of 1932 as Sections 8507 to 8530, both inclusive. The appellees, in their complaint, Paragraph 2, cite this Act as affecting them (R. 4); again, they refer to said Act in Paragraph 9, without specifically designating it, although that reference could not refer to any other Act, and allege that the South Carolina Public Service Commission † had refused to issue licenses to them under said Act, and that they are required by said Act to obtain operating licenses for each unit of equipment operated on the highways by them (R. 12); and Section 8525 of the Code of Laws of South Carolina of 1932, requires all vehicles licensed as carriers for hire by the Public Service Commission to pay to the State Highway Department the same license fees as are required of residents of the State. See Sections 8525 and 5894, South Carolina Code of 1932, Appendix II hereto.

Although the registration data referred to were submitted at the trial appellees made no attempt to show that such figures did not include the vehicles operated by appellees. There is no showing that registration statutes were suspended by injunction. Registration is required for the dual purpose of identifying the vehicles registered and exacting compensation for the privilege of highway use. Although under injunctive protection interstate motor carriers might have used vehicles of any size or weight they saw fit, it seems clear that these figures show that only 19 vehicles weighing more than 20,000 pounds or less than .06 per cent.

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* In *Hicklin v. Coney*, 290 U. S., 169, this Court held that Act not to be an unreasonable burden upon interstate commerce, and approved its construction by the State Court, affirming 168 S. C., 440.

† The Public Service Commission of South Carolina was, until February 11, 1935, named "Railroad Commission", and by the latter name such Commission is designated in the Code of 1932. The name of the Commission was changed by Act No. 18 of 1935 (Acts of 1935, page 25).

of the trucks using South Carolina roads were even authorized to operate. It is reasonable to assume that not all of these were operating in South Carolina at the same time.

Thus, it may be seen that the commerce which appellees claim is interfered with, that which would be "practically prohibited" has been grossly exaggerated both in the proceedings in the lower Court and by appellees' brief.

Appellees refer at pp. 61-62 to an Act of the General Assembly of South Carolina passed in May, 1937, but vetoed by the Governor. To make clear what happened we set out here the Governor's veto message.

Journal of House of Representatives
May 18, 1937 No. 74, P. 7
Governor's veto message

Executive Chamber,
Columbia, S. C.,
May 17, 1937.

Mr. Speaker and Gentlemen of the House of Representatives:

I herewith return without my signature House Bill No. 341, Senate Bill No. 888, Act No. 567, entitled:

"To regulate and limit the use of highways: To provide for safe operation of vehicles on highways and to require safety equipment, devices and measures; and to provide for the enforcement of this Act and to prescribe penalties for the violation thereof."

I have given the measure my most serious thought and am convinced after weighing its good and bad features that the ultimate effect will be to impair rather than promote safety upon the highways of South Carolina.

It is another of those highway omnibus measures. It permits veritable trains upon the roads of South Carolina,

and requires the ordinary citizen, the driver of the model "T", to carry five tires in meeting and dodging these large trains on our highways.

Respectfully submitted,

(s) OLIN D. JOHNSTON,
Governor.

This veto was sustained by the vote of the House of Representatives, 83 voting to sustain it and 27 voting to override it. Journal, May 19, 1937, No. 75, pp. 51-52.

We see no valid purpose for showing, in this proceeding, subsequent action by a portion of the legislature which, in its final result, was not conclusive. It is only natural that such body would attempt to take some kind of action to protect the roads. The effect of the injunction in this proceeding and the long series of judicial proceedings immediately preceding it was to virtually paralyze the legislative action. So far as the law is concerned vehicles of any size or weight must be permitted to proceed at will. The fact that a portion of the legislature thought it wise or expedient to lay down some kind of limitation thought to be valid, even though radically different than the statute in question, is no proof that the character of South Carolina roads has changed or that even the opinion of the legislature has changed and certainly does not prove that the statute in question is unreasonable.

In pages 63 to 100, appellees argue that the 20,000 pounds gross weight limitation is not a valid weight limitation because highway stresses are ruled by wheel and axle loads.

(a) The first observation to be made on this argument is that it was completely disposed of in *Sproles v. Binford, supra* (286 U. S., 374). As we pointed out in pages 38-39 of our brief, the printed record shows that the evidence pre-

sented by complainants in that case was of the same character on this point as the evidence in the instant case, except that it was better organized and stronger. The testimony of Thomas H. MacDonald, Chief of the United States Bureau of Public Roads, before the Interstate Commerce Commission, Docket No. 23400, referred to at page 39, appellees' brief, was a part of that record. With respect to all this the Court said (286 U. S. at 388):

> "Appellants urge that this provision repeals the former law which was properly designed to protect the highways and that the drastic requirement of the amendment is opposed to sound engineering opinion; that when gross weight is restricted by the 600 pounds per inch of tire spread upon the highway there is left sufficient margin to carry greater cargoes than 7,000 pounds without causing damage; and that damage from overweight can be prevented only by regulations which fix a maximum gross load and provide for its proper distribution through axles and wheels to the highway surface."

Then follows that part of the opinion recited on page 39 of our first brief.

(b) However, assuming this were a case of first impression, the evidence amply supports the statute. We have covered this in pages 46 to 108 of our first brief.

At page 65 appellees state that our defense of the 20,000 pounds gross weight limitation is based upon "maneuverability" and facility of compliance. These are only two observations occupying respectively one-half page (67) and less than two pages (71-72) of our brief. Our principal arguments supporting the 20,000 pounds gross weight limitation appellees do not answer.

(a) As pointed out in our first brief (pp. 50-52), it is evident that the District Court held the 20,000 pounds gross weight limitation invalid only because it found that the concrete paved portions of the four per cent. of the highways to

which the decree extends can carry safely 8,000 to 9,000 pounds wheel loads and 16,000 to 18,000 pounds axle loads. The District Court was not justified in making this finding, however, because in any view there was a substantial conflict of the evidence on it; however, we submit that the plain weight of the evidence was to the contrary (pp. 50-63).

(b) The 20,000 pounds gross weight limitation for its own sake is amply justified under the evidence. It remains undisputed that 1,080 to 1,200 miles of the concrete pavement has no center joint, and that as to such pavement the 20,000 pounds gross weight limitation is generous. Subgrade conditions turn numerous short pieces of concrete pavement into virtual bridges, absolutely necessitating the statutory limitation. Appellees make no mention of *Werner Transportation Co. v. Hughes,* 19 Fed. Supp., 425, in which a Three-Judge-Court opinion (our first brief, pp. 78-79), substantiates at length our evidence on this point (pp. 63-83).

(c) There does not in fact exist the well-connected system of concrete highways which the District Court assumed, not only without any evidence to support its assumption but directly in the face of all of the evidence on the point, which is entirely to the contrary (pp. 86-94).

(d) The statute is necessary to protect **all** of the bridges and highways of the State (pp. 95-108).

Facility of compliance with the statute was cited by us as one of the practical considerations in the mind of the Legislature commending the statute as contrasted with the wheel and axle weight theory urged by appellees as the only proper kind of limitation.

"Maneuverability" was merely cited by us as one of the objectives of truck operators in placing a greater portion of the truck load on the rear axle so the truck may be easily streered by its front wheels. The customary lighter weight on the front axle is merely one of the elements to

be considered in showing that a gross weight limitation automatically includes the elements of wheel and axle weight limitation.

Appellees place great reliance on their claims: (a) That heavier loads than the statute permits have been going over the concrete highways; (b) that no damage to them has appeared, and (c) this proves that the highways can bear safely these heavy loads (p. 84 and elsewhere).

The first fallacy in appellees' argument on this point is their assumption that because statutory weight limits were enjoined as to some carriers since December, 1934, loads heavier than those permitted by the laws in question actually moved over the highways. If this point is pertinent to the issues, appellees had the burden of proving it. They failed to do so. If any assumptions are to be indulged in we must assume that the law was obeyed particularly after it was found in the *Nutt case* that the law is valid and after *certiorari* had been denied by this Court.

On the proposition that no damage to the highways has appeared as a result of heavy traffic, whatever it may have been, the evidence is to the contrary and for this further reason the whole proposition falls.

The only witness for appellees who made any examination of the roads at all was Harry Tucker. As appellees admit (p. 84), "he made no detailed study of the highways." In fact his only "study" was the automobile trip over the route shown on Appendix VII, page 161 of our first brief. There is no evidence that there was no damage to the concrete roads. To the contrary J. S. Williamson, Chief Engineer of the South Carolina Highway Department, testified that there have been serious failures in the concrete pavements (R. 176, 187), that the concrete pavement will stand excessive loads for a time but will break down sooner than if it had a lighter load (R. 195). Clifford Older testified that concrete pavement may be overstressed for sev-

eral years without showing visible signs of distress, but that overstressed roads will break down finally as the direct result of overloading them, due to the accumulation of fatigue in the concrete (R. 235). None of this testimony is contradicted.

So, even if we assume that some concrete roads have been carrying excessive loads such assumption does not establish that such loads have not caused or are not causing failure that has destroyed or will destroy the road, nor that such roads can bear safely such heavy loads.

Appellees by their scant reference at pages 86-87 do not answer the argument and the material from "Public Roads" and from the opinion in *Werner Transportation v. Hughes, supra* (19 Fed. Supp., 425), set out in pages 72-81 of our brief. If they had an answer the same talent which deailed the history of highway transportation in pages 7 to 54 of their brief would surely have devoted more space to this important point.

They refer to these excerpts as being "lifted bodily from their contexts." If this were a just criticism, they could have easily demonstrated it. We think that the quoted excerpts are substantial summaries of the entire articles. To demonstrate this, we here set out the summarizing paragraph of the article from "Public Roads" referred to on page 73 of our first brief. This paragraph is from page 62, No. 3, Vol. 10, May, 1929. The italics are supplied.

> "According to the preceding discussion, the selection of type and the design of pavements are not arbitrary matters. Each and every particular pavement variable—stability, "beam" strength, pavement thickness, steel reinforcement, grooves and joints, shoulders, subbases, subgrade treatments, subgrade preparation and artificial drainage, has a particular function to perform with regard to the conditions of support furnished by the subgrade. *Therefore, subgrade data fur-*

nish the only possible basis for rational pavement design."

At page 87, appellees state: "The evidence discloses that the subgrade conditions in South Carolina were 'most excellent'." This happens to be the general statement without any supporting details, of Harry Tucker, who, as appellees admit (p. 84), "made no detailed study of the highways," and whose "study" was confined to the automobile trip shown on Appendix VII, page 161, of our first brief. It is contradicted by the specific evidence of Chief Highway Engineer Williamson (R. 160, 179), and "Public Roads" (see pp. 75-76 of our first brief). Mr. Teller stated that he knew nothing about the roads of South Carolina (R. 134), hence he obviously would not have "had these factors in mind" when testifying.

These excerpts from "Public Roads", particularly the one set out just above, in addition to the application made in our original brief, demonstrate the additional fact that there can be no such thing as a standard concrete pavement of equal bearing power throughout all the states.

Appellees concede (pp. 89-91):

"that if the extraordinary estimates of Appellants' witness, Mr. Clifford Older (R. 231-250) be accepted, the finding of the District Court was not correct."

This concession should end the case, despite appellees' attacks on the witness. In the first place, a considerable part of his testimony was substantially the same as that of Chief Highway Engineer Williamson. And a large part of his testimony that is not similar to Williamson's is not contradicted, plainly can not be contradicted, and is conclusive of the issues; we refer to his testimony relative to the 1080 to 1260 miles of the concrete pavement which has no center joint (See our first brief, pp. 67-69). The correctness of his testimony that such pavement should not be subjected to wheel loads in excess of 4,000 to 4,200 pounds was not

questioned by anyone at the trial, and is not attacked in appellees' brief. If there has been an answer to it appellees surely would have put their witnesses Tucker and Teller on the stand to furnish it.

And Mr. Older's testimony as to the weakness of pavement without center joint (p. 68 our first brief) is corroborated by the best authorities. Thus H. M. Westergaard (referred to in Mr. Tucker's testimony, R. 126), Professor of Theoretical Science, University of Illinois, stated in an article entitled "Mechanics of Progressive Cracking in Concrete Pavements," in Vol. 10, No. 4, p. 69, May, 1929, of "Public Roads":

> "If a longitudinal crack occurs in an unreinforced pavement, it is likely to open up widely, since the slabs may creep transversely. In view of this relative significance of the longitudinal cracks, it appears especially desirable to anticipate the tendency for the cracks to form by introducing properly designed longitudinal joints."

In "Public Roads," Vol. 11, No. 8, p. 152, October, 1930, the following is stated in an article on cement pavements, at p. 155:

> "Longitudinal joints in pavements have met much favor, as they eliminate irregular longitudinal cracking."

As a conclusion the same article states (p. 155):

> "11. *Longitudinal and transverse joints are commonly used and must be designed to meet traffic, subgrade, and climatic conditions.*" (Italics supplied.)

There is a detailed study of the subject of longitudinal joints in the September and October, 1936, issues of "Public Roads," Vol. 17, No. 7, p. 143, and No. 8, p. 175. This is entitled "A Study of the Structural Action of Several Types of Transverse and Longitudinal Joint Designs," by the Division of Tests, Bureau of Public Roads, and is reported by L. W. Teller, Senior Engineer of Tests, ap-

pellees' witness in this case, and Earl C. Sutherland, Associate Highway Engineer.

In No. 7, at pp. 145-146, it is stated:

"The decade following 1920 also saw the general adoption of longitudinal joints that divide the pavement into slabs approximately 10 feet wide. Experience showed that such joints practically eliminated longitudinal cracking and, since this width is about what is required for a single lane of traffic, the practice of building pavements in slabs about 10 feet wide has developed naturally and has resulted in effective control of longitudinal cracking.

"During the early part of this decade researches such as the test road at Pittsburg, Calif., the Bates road tests in Illinois, and experiments of the Bureau of Public Roads at Arlington, Va., developed certain basic facts concerning the effect of loads on pavement slabs of various designs. In all of these researches the need for strengthening slab edges was definitely indicated. Free edges of slabs can be strengthened most simply by increasing the slab depth, but where the slab adjoins others the possibility for inter-slab support as a means for strengthening the edges has long been recognized and has led to many proposals for joint designs in which varying degrees of interlocking action are developed. The use of transverse joint designs in which some form of load-transfer mechanism is incorporated has become quite general, the round steel dowel bar being the most common."

In "the most important conclusions to be drawn as a result of this study," it is stated in No. 8, p. 191:

"3. Since a free edge is a structural weak spot in a slab of uniform thickness, it is necessary to strengthen the joint edges by thickening the slab at this point or by the introduction of some mechanism for transferring a part of the applied load across the joint to the adjacent slab. *Otherwise, the strength of the joint edge will determine the load-carrying capacity of the pavement.* (Italics supplied.)

"4. The structural effectiveness of a joint design is measured by its ability to reduce the critical edge stress to a value equal to the critical stress which exists in the interior area of the slab."

The conclusions then go on to describe the various types of joints used and their effectiveness in transferring the load to the adjacent slab.

Arthur G. Bruce, Senior Highway Engineer of the United States Bureau of Public Roads, states in his book "Highway Design and Construction" (International Textbook Co., 1934), on page 367:

"It has also been found advantageous to divide pavements into lanes about 10 feet wide by longitudinal joints as longitudinal cracking is thus reduced to a negligible amount."

In "Principles of Highway Engineering" by Carrol C. Wiley, C.E., Ass't Professor of Highway Engineering, University of Illinois (McGraw-Hill Book Co., 2nd Edition, 1935), it is stated on page 228:

"Center Joints. Center joints were suggested about 1912, but the idea received little attention until the Bates road[2] tests showed their advantage. *They have now become standard practice on both rural roads and city streets.* (Italics supplied.)

The foregoing also demonstrates that the 1080 to 1200 miles of concrete pavement in South Carolina without center joint plainly cannot be called "standard pavement." It further demonstrates again that there can be no such thing as standard concrete pavement throughout all the states because longitudinal joints must be designed, as stated in "Public Roads", "to meet traffic, subgrade, and climatic conditions." Obviously these are local conditions.

As to Mr. Older's reputation and professional standing, he was respectfully referred to by appellees' engineering witness Tucker (R. 126, 129). He is also referred to

[2] Proc. A. S. C. E., Vol. 50, No. 2, p. 175, February, 1924.

with respect in Mr. Bruce's book (p. 281) as the originator of "the formula widely used for determining thickness at the edge of a double track pavement resting on ordinary soil." This is identified by Mr. Bruce as the Bates road test. And it is interesting to note that the Court in *Werner Transportation v. Hughes, supra,* found as a fact that the concrete roads in Illinois had been damaged, as Mr. Older testified that he had observed (R. 238).

On page 97 appellants state:

> "* * * The enforcement of the South Carolina regulations will result in defeating the purposes for which the national Government and the states have completed the improved and capable primary Federal Aid System."

There is no competent proof in the Record as to what are these "purposes." Conceivably these purposes may be to furnish to 99.94 per cent. of the trucks which are licensed to carry no more than four tons or the 99 per cent of the trucks licensed to carry no more than three tons (R. 272) and all the passenger cars with safe and adequate highways, building a great deal more mileage for such than could be built with the same money for the heaviest vehicles (R. 161). The Bureau of Public Roads has recognized such a purpose in furnishing aid for such low type roads (R. 253). And it assuredly is not defeating any conceivable purposes for the State to insist upon preserving the 148.3 to 358.2 miles of low type roads interspersed with the concrete upon the numbered highways named in the decree (our first brief, pp. 92-93). The undisputed evidence and the District Court's findings are that the statute is necessary and reasonable as to such types of roads, but the decree opens them to unrestricted weights because the Court thought them unimportant (our first brief, p. 93). It further is not defeating any purpose for the State to insist upon preserving its 1080 to 1200 miles of concrete pavement

without center joint as to which it is not contradicted that they should be limited to wheel loads of 4,200 pounds (our first brief, pp. 67-69). It is not defeating any purpose when the legislature, upon the advice of highly competent State engineers, fixes a weight limit calculated to preserve all of the State's highways. It is no defeating any purposes for the State to seek to conserve its best concrete highways upon the advice of its own engineers even though commercial truckers with their own "purposes" to serve dispute the opinion of such engineers.

Furthermore, there is no explanation in the record of the "capable primary Federal Aid System" referred to in such statement. Although such roads may be capable for automobile traffic and the great majority of trucks, namely those not exceeding 20,000 pounds gross weight, we cannot assume that the Federal Aid System, as a system, is capable of supporting vehicles of greater weight than 20,000 pounds or even of the axle loads of 16,000 to 18,000 pounds.

On page 103 appellees purport to set forth the contrast in the respective positions of the appellants and the appellees. In the first place attention is called to the fact that appellants' position there referred to by appellees is only a part of one of several arguments earnestly urged by us. Furthermore, appellees attempt at showing a contrast falls far short of doing so. Without in any way attempting to repeat our legal arguments or in any manner to limit those we urged in our original brief by what we say here, it is apparent that appellees proceed upon the premise that the statute in question "exceeds the reasonable necessity for the exercise of the police power." That is an incorrect premise. As we insisted in our original brief, we take the position that the statute does not exceed the reasonable necessity for the exercise of the police power. This is apparent from a consideration of our brief. The cases cited

on pages 105 to 115 of appellees' brief do not reach the fundamental principles we rely on to sustain the statute.

On page 118 appellees apparently claim that the principles of certain cases which we cite (being *Geer v. Connecticut*, 161 U. S., 519; *Silz v. Hesterberg*, 211 U. S., 31; *Bayside Fish Flour Co. v. Gentry*, 297 U. S., 422), have been "repudiated" by other cases. To show how erroneous is appellees' claim it is only necessary to read the cases which we cite. The principles they state have never been questioned. They distinguish the cases which appellees cite. Thus, the latest of them all, *Bayside Fish Flour Co. v. Gentry, supra*, cites as authority *Silz v. Hesterberg, supra*, and (p. 427) expressly distinguishes from this line of cases *Foster-Fountain Packing Co. v. Haydel*, 278 U. S., 1.

There is nothing in *Oklahoma v. Kansas Natural Gas Co.*, 221 U. S., 229, or *Pennsylvania v. West Virginia*, 262 U. S., 553, which in the least diminishes the state power upon which we rely. The controlling principle of the decision in *Oklahoma v. Kansas Natural Gas Co.* is shown in the following from p. 262:

> "The State, as we have seen, grants the use of the highways to domestic corporations engaged in intrastate transportation of natural gas, giving such corporations even the right to the longitudinal use of the highways. It denies to Appellees the lesser right to pass under them or over them, notwithstanding it is conceded in the pleadings that the greater use given to domestic corporations is no obstruction to them. This discrimination is beyond the power of the state to make."

And the principal issue in *Pennsylvania v. West Virginia* was stated by the Court, as follows:

> "We turn now to the principal issue, whether a State wherein natural gas is produced and is a recognized subject of commercial dealings may require that in its sale and disposal consumers in that state shall be accorded a preferred right of purchase over con-

sumers in other states, when the requirement necessarily will operate to withdraw a large volume of the gas from an established interstate current whereby it is supplied in other States to consumers there."

In pages 133 to 140 appellees attempt to distinguish *Morris v. Duby*, 274 U. S., 135, and *Sproles v. Binford*, 286 U. S., 374. As a part of that argument they make what we consider to be an incorrect statement of the record on page 140. While *Morris v. Duby* did not contain some of the fact elements of this case, the law there declared demonstrates the District Court's error. But *Sproles v. Binford* does contain every fact element present in the instant case. Because of appellees' continuous insistence to the contrary, we again briefly discuss this case in connection with appellees' argument at this point.

In *Sproles v. Binford* there was (1) as much burden on interstate commerce as the instant case, (2) the same kind of engineering evidence as the instant case (our original brief, pp. 38-39; and this reply brief): (3) and in the instant case, as in the *Sproles case,* there is no regularly connected system of concrete highways. It is this third element we notice at this point. We wish to call the Court's particular attention to appellees' erroneous statement of the record on page 140.

The correctness of the figures shown in the table on page 92 of our first brief is not challenged by appellees, as indeed it could not be, being based strictly on appellees' Exhibit No. 6. Appellees' only reference to this table is to draw the patently erroneous deductions stated on page 140 of their brief. So let us see just what that table does show.

The table shows the roads designated by number in the District Court's decree. It shows the mileages of the various types of road surfacing on such designated roads. The total mileage of all types of surface is 1134.7 miles. Of this total mileage there are the following mileages of roads

which, under the undisputed evidence and as found by the Court, are the types as to which the 20,000 pounds gross weight limitation is reasonable. Bituminous types are omitted from the following table and will be considered separately.

	Miles	*Per Cent. of Total*
Macadam surfacing	70.9	6.2
Sand-clay surfacing	25.2	2.2
Earth surfacing	10.3	0.9
Not specified surfacing.....	41.9	3.7
Total	148.3	13.0

Thus, leaving out of consideration any bituminous types, there are in the highways specifically designated by number in the District Court's decree 148.3 miles of low-type, non-bituminous and non-concrete roads, constituting 13 per cent. of the total of such mileage.

As to the bituminous types, the map, appellees' Exhibit 6, includes all bituminous types under one key marking, that is, the map legend states that roads marked "A" include "roads having surfaces of bituminous materials irrespective of base: such as Sheet Asphalt, Bituminous Concrete, Bituminous Macadam and all types included in Bureau's Code Numbers 480-630". Of these there is a total mileage in the numbered highways enumerated in the decree of 209.9 miles or 18.5 per cent. of the total.

The only evidence in the record even tending to support appellees' claim as to the load-carrying capacity of any type road other than concrete is that concerning bituminous concrete. At page 140 of appellees' brief appears the following:

> "Thus, of the total of 1134 miles on these 7 highways across the State of South Carolina, only 3.1 per cent., or 35 miles, is shown as not surfaced either with concrete, *bituminous macadam,* or bituminous concrete,

which the evidence disclosed was of the best type and to be ably supporting the present traffic without damage." (Italics supplied.)

Although not mentioned in our original brief, appellees' Exhibit No. 4 (R. 253) "Mileage of Highway and Grade Crossing Projects in South Carolina Improved With Funds Available to the Bureau of Public Roads as of October 31, 1936" indicates that there are 3.3 miles of bituminous macadam pavement in the Federal Aid system in South Carolina. Except for that one reference and for the legend which appears on the map, appellees' Exhibit 6, there is no evidence in the record of any character even tending to show the existence of bituminous macadam pavement in the State of South Carolina. The record also shows (R. 159) 1724 miles of bituminous surfacing on a "low cost," processed sand, sand-clay or similar base described by the witness, Williamson (R. 160, 161). There is not only a failure of proof as to the existence of more than 3.3 miles of bituminous macadam pavement in the State, and failure of proof as to where it may be located, but appellees assume in the above-quoted excerpt from their brief a condition of the record which does not exist when they include bituminous macadam pavement among the highways described "as of the best type." The appellees' own witness, Teller, at R. 134, admits the impossibility of calculating the weight-carrying capacity of bituminous macadam and similar types of pavement. As we indicated in our original brief, if it is material to the issues, appellees had the burden of proving that the seven highways named in the decree constitute a well-connected system of roads capable of bearing loads greater than those prohibited by the statute. Certainly the 209.9 miles of bituminous surfacing is not proven to be bituminous concrete. Neither is it proven to be bituminous macadam, and even if it were it is not proven that bituminous macadam is capable of supporting loads any greater than those permitted

by the State. The District Court held to the contrary. See the discussion of all this in pages 91-94 of our first brief.

Thus the highways designated by number in the District Court's decree, presumably the best in the State, totaling 1134.7 miles, contain, interspersed in that mileage, from 148.3 to 358.2 miles of low-type surface roads, types as to which the 20,000 pounds gross weight limitation was found reasonable by the District Court (R. 85).

In view of these undisputed facts we see no foundation for the statement on page 140 of appellees' brief.

It is submitted that had the District Court realized these facts it would not have found (18th Finding of Fact, R. 81, R. 85) that this interspersed mileage of low-type roads consists of "a few short stretches a few miles in length which are not of sufficient importance to justify the denial of the use of these arteries of commerce for the use for which they were constructed." As we pointed out at page 93 of our first brief this is not a finding of actual fact but is a conclusion lacking any factual basis.

It is further submitted that the foregoing plainly shows that in the instant case, as in *Sproles v. Binford, supra,* the high-type roads do not form a regularly connected system. And when it is considered that the District Court held that as to 96 per cent. of the highways the statute is reasonable, the similarity to *Sproles v. Binford* is further revealed.

In pages 141 to 149 appellees attempt to meet Part IV of our first brief, pp. 139-144. Unfortunately for appellees' contentions the cases of any materiality which they cite are direct authority for our position. We are particularly indebted to appellees for referring to *Central Kentucky Co. v. Commission,* 290 U. S., 264. Thus in that case the actual holding of this Court was (p. 271):

> "District courts may set aside a confiscatory rate prescribed by state authority because forbidden by the Fourteenth Amendment, but they are without authority

to prescribe rates, both because that is a function reserved to the state, and because it is not one within the judicial power conferred upon them by the Constitution." (Citing cases.)

And this Court there reversed the District Court because it refused to enjoin one rate unless the plaintiff would accept another.

The other rate fixing cases cited by appellees are those in which a court **as part of temporary injunctive relief to maintain the** *status quo pendente lite* fixed a maximum rate. This Court distinguishes temporary relief of that kind from permanent injunctive relief in *Central Kentucky Co. v. Commission, supra.*

It seems plain that if the District Court had realized that it must consider the highway system as a whole and that it could not enact a new width limit it would have held the statute valid as to all roads.

Appellees state (p. 143) that the District Court "faced an intricate and difficult problem • • •." Taking that statement at its face value, it simply means that in the attitude it adopted the District Court took upon itself legislative powers.

On October 29, 1937, the Court of Appeals of Kentucky upheld the constitutionality of the laws of Kentucky limiting gross weight of motor vehicles, including a tractor-semi-trailer combination, to 18,000 pounds. *Whitney v. Fife,* 109 S. W. (2nd), 832. At p. 835 the Court said:

> "• • • it appears to us that the conclusions reached by the court in the South Carolina decision are not in accord with the decisions of the Supreme Court of the United States in so far as it held the South Carolina statute invalid as to certain roads, and failed to give effect to the principle that the legislative authority had the right to use its judgment in determining what regulations were necessary or proper, as was

held in the various opinions of the Supreme Court cited herein."

Respectfully submitted,

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APPENDIX I.

Acts of South Carolina, 1920—Statutes at Large, Volume 31, pp. 1072, 1075

ACT No. 602

AN ACT to Create a State Highway Department, to Define Its Duties and Powers, to Provide Funds for Its Maintenance by the Licensing of Motor Vehicles Operated on the Highways of the State, to Raise Revenue for the Construction and Maintenance of a System of State Highways, and to Assent to the Provisions of an Act of Congress, Approved July 11, 1916, Entitled "An Act to Provide That the United States Shall Aid the States in the Construction of Rural Post Roads and for Other Purposes," and All Acts Amendatory thereto.

Section 9. Offenses in Regard to State Highways—Obstruction of Drainage—Placing Objects Injurious to Vehicles—Cutting Trenches, Etc., Without a Permit—Loads or Vehicles of Excessive Weight or Width—Tractors—Timber Carts.—It shall be unlawful for any person to willfully obstruct ditches and drainage openings along said roads, to place obstructions upon said roads, or to throw or place on said roads any objects likely to cut or otherwise injure vehicles using same. It shall also be unlawful for any person, firm or corporation to cut trenches, lay pipes or tracks through, under, over or on said highways and bridges without first obtaining a permit from the State Highway Engineer; or to transport over such highways and bridges loads exceeding a specified tonnage or weight per square inch of bearing surface in excess of that prescribed in the regulations laid down by said Highway Commission; or to run or operate any farm tractor or traction engine with wheel lugs or cleats on said highway, without first removing said lugs or cleats, or providing fillers for same,

so that no injury will be done to road surface, **or to operate over said highways or bridges any motor vehicle, the maximum width of which, or of the load it carries, exceeds seven and one-half feet (7½'),** or to operate motor vehicles with chains upon or around the wheels, contrary to such regulations for the use of chains which may be adopted and promulgated by the State Highway Commission. It shall also be unlawful to operate upon any of the public highways of this State any two-wheeled timber carts, with tongue or small wheel attached thereto, which comes in contact with the road, and it shall also be unlawful to operate any vehicle over said roads for the purpose of carrying timber or other loads, by which timber or any other character of load is allowed to strike or drag on the surface of the road: Provided, further, That this proviso shall not apply to four-wheeled lumber carts where the load is so suspended as not to come in contact with the road. Any violation of the provisions of this section shall be deemed a misdemeanor and punished by the fine or imprisonment prescribed in Section 15 hereof. (Emphasis added.)

APPENDIX II.

Code of Laws of South Carolina of 1932, Volume 3, Section 8525 and Section 5894

Section 8525. Additional Annual License Fee Required of Owner or Operator of Motor Vehicles Engaged in Transporting Persons or Property for Compensation.—(1) *Amount.*—Before operating upon the public highways of this State, every owner or operator of motor vehicles engaged in the business of transporting persons or property for compensation on the public highways of the State of South Carolina under the provisions of Sections 8507 to 8524, inclusive, shall, in addition to the license fees imposed by said sections pay to the State Highway Department an annual license in an amount equal to or the same as the annual license paid by and required of the owner of motor vehicle under the provisions of Section 5894.

(2) *Purpose of this Section.*—It is the purpose of this section that the annual license herein imposed shall be in addition to the license fees imposed by Sections 8507 to 8524.

(3) *Disposition of Funds.*—All funds derived by the State Highway Department from the provisions of this section shall be credited to the State Highway Fund and used for the construction and maintenance of the State Highway System.

(4) *Violation a Misdemeanor—Penalty.*—Any person, firm or corporation violating the provisions of this section shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than Ten ($10.00) Dollars nor more than One Hundred ($100.00) Dollars or be imprisoned not less than ten (10) nor more than thirty (30) days within the discretion of the Court.

1930, XXXVI, 1398.

Section 5894. Annual License Tax on Motor Vehicles—For Part Year—Transfers—"Motor Vehicle" Defined.—On and after January 1, 1926, every resident owner of a motor vehicle in the State of South Carolina shall pay to the State Highway Commission in lieu of all other State, municipal or county licenses, an annual license as follows:

For each automobile weighing not over 2,000 pounds, the sum of Nine ($9.00) dollars; for each additional 500 pounds of weight, or fraction thereof, the additional sum of three ($3.00) dollars. The manufacturer's weight of automobiles shall be accepted as the weight for the purpose of registration hereunder. And for trucks the license fees shall be as follows:

Trucks of a capacity of not exceeding one ton, thirty ($30.00) dollars, trucks exceeding one ton and up to and including two tons, sixty ($60.00) dollars. Trucks exceeding two tons and up to and including three tons, one hundred and twenty ($120.00) dollars. Trucks exceeding three tons and up to and including four tons, two hundred ($200.00) dollars. Trucks exceeding four tons and up to and including five tons, four hundred ($400.00) dollars. Trucks exceeding five tons and up to and including six tons, six hundred ($600.00) dollars. Trucks exceeding six tons and up to and including seven and over, eight hundred ($800.00) dollars: *Provided,* That a reduction of fifty (50%) per cent. on the license be allowed on all trucks using pneumatic tires on all the wheels. Lumber trucks and other trucks with trailer attached shall pay an annual license of twenty ($20.00) dollars for each trailer so operated, and an additional sum of eight ($8.00) dollars for every 1,000 pounds or part thereof of ordinary loading capacity of such trailer: *Provided,* That where pneumatic tires are used on trailers a reduction of fifty per cent. shall be allowed: *Provided,* That no truck larger than a four-ton truck shall be allowed to be used on a highway or public road in this State unless the

person desiring to operate any such truck larger than a four-ton truck shall first make a petition to the authorities in charge of the roads in any county where it is proposed to operate such truck, stating the road or roads proposed to be used and such road authorities shall consent to the use of such truck on such roads, and such consent shall be approved by the State Highway Engineer, in which event such truck shall, upon payment of the license fee herein provided, be permitted to operate on the road stated in the petition and none other. For every motorcycle, five ($5.00) dollars *per annum*.

All licenses shall expire on the 31st day of December, following the day of issuance. Annual license shall thereafter be issued between the first day of January and the first day of February of each year. In the case of motor vehicles registering for the first time, the full annual fee shall be paid for licenses issued between January 1 and March 31st; three-fourths of the annual license fee for license between April 1st and June 30th; one-half of the annual fee of license between July 1st and September 30th; and one-fourth of the annual fee for license issued between October 1st and December 31st. The State Highway Commission shall furnish the Clerk of Court of each county with a sufficient supply of application blanks for licenses for use of the people of the county. The term motor vehicle, as used in this section, shall be construed to mean and include all automobiles and vehicles, whether propelled by steam, gasoline, electricity or other such sources of energy other than muscular power, except farming implements, or as operated only upon rail or tracks therefor.

1926, XXXIV, 983.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL.,

Appellants,

vs.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF FOR APPELLEES.

Preliminary Statement.

Counsel for the original and intervening defendants, appellants, have incorporated in their separate briefs identical statements of the case, citation to the opinion of the District Court, jurisdictional statement, specifi-

cation of the statute involved, and of the rulings and final decree of the District Court. Inasmuch as these statements and specifications are correct it is unnecessary to make further statement or specification of these matters here.

Counsel for appellants correctly state, at page 3 of their briefs, that the only provisions of the South Carolina Act (Act No. 259, approved April 28, 1933, 38 St. at Large 340, printed in full in Appendix I of South Carolina Brief) which are in issue on this appeal are Section 4, imposing a gross weight limit of 20,000 pounds, that portion of Section 2 requiring tractor-semi-trailer combinations to be considered as a single unit for determining gross weight, and Section 6 imposing a width limit of 90 inches.

In their "summary of evidence" at page 11 of their briefs appellants' counsel have toned down the evidence in the record as to the burden which will be inflicted by the enforcement of the regulations upon interstate commerce, and have de-emphasized the testimony of appellees' witnesses regarding the capacity of the highways and the reasonableness of the contested regulations as applied to them. In particular this "summary of evidence" omits the opinion of the Chief Highway Engineer of South Carolina that the South Carolina roads enjoy the reputation of being "as good as any in the country" (R. 180) and "are the best in the Southeastern part of the country" (R. 184). No additional or substitute summary of the evidence will be here made, but a proper summary of the evidence of record as to the burden inflicted upon interstate commerce will be found under subsection B of Section I of this brief, and a more complete and proper reference to the evidence as to the capacity of the highways and the reason-

ableness of regulations as applied to them will be found in subsections A and B of Section 2 of this brief.

Four briefs on behalf of appellants have been filed in this Court; the brief of the original defendants, the brief of the intervening railroad defendants, and the briefs of the States of Kentucky and Illinois, *amici curiae*.[1]

Inasmuch as these briefs have apparently been commonly designed to cover and separately emphasize the same arguments we will consider them as one brief to which this brief is reply.

SUMMARY OF ARGUMENT

Appellees by this brief support the conclusion of law of the District Court that the following quoted sections of the South Carolina Act (No. 259, approved April 28, 1933, 38 St. at Large, 340) are unconstitutional and void in that they contravene Section 8 Article 1 of the Constitution of the United States by arbitrarily and unreasonably inflicting a substantial burden upon interstate commerce and exceed the reasonable necessity for their exercise.

No contention is here made that these sections of the South Carolina Act have been superseded by either the Federal Highway Act (Section [illegible] Title 23 U. S. C.) or the Motor Carrier Act, 1935 (Section 301 to 327, title 49 U. S. C.)

SECTION I.

The enforcement of the South Carolina regulations will inflict a substantial burden upon and seriously interfere with interstate commerce. The commerce af-

[1] These briefs will hereinafter be referred to respectively as "S. C. Br.", "Rd. Br.", "Ky. Br.", and "Ill. Br.".

fected is the transportation of commodities over land highways in the South Atlantic Region of the United States. The use of the highways involved is not confined by the pleadings or proof to their use for hire, but includes their general use for the transportation of commodities in interstate commerce. This use of the highways is not special or extraordinary but is one of their primary historic functions. After playing an integral part in the civilization and development of this country, both prior to and after its independence, the interstate transportation of commodities over land highways at the end of the third decade of the Nineteenth Century fell into desuetude because of the competition of railroads. However, the national government, during the early years of the Republic, had exerted its powerful influence in the promotion of this commerce by its participation in the construction and control of interstate highways. After the renaissance of highway transport during the first two decades of the present century, the national government in 1921 entered upon a cooperative undertaking with all the States, to build a national system of highways, which were to remain within the control of the States, but were to form an inter-connected, interstate system, integrated with the various State highway systems. As a result of this undertaking the nation now possesses a national interconnected system of interstate highways adequate to carry the reborn transportation of commodities in interstate commerce which has assumed a status of great importance in the transportation life of the nation. In 1935 the Congress of the United States undertook comprehensive regulation and protective promotion of a large part of this commerce. The enforcement of the South Carolina regulations will practically bar a great

part of this commerce from the Southeastern section of the United States and deny its benefits to the people of that section. It will defeat the purposes of the cooperative undertaking by which the Federal government extended aid to the States in building and planning the interstate highway system, and will defeat the purposes and policies of Congress in its regulation and preservation of that commerce.

II.

The burden upon interstate commerce which as shown in Section I will be inflicted upon interstate commerce by the enforcement of the South Carolina regulations will be arbitrarily and needlessly imposed. The regulations, as applied to the existing transportation of commodities over the main interstate highway system of South Carolina, transcend the reasonable necessity for their exercise, irrespective of the physical capacity or functional character of those highways, and *a fortiori* because of the capacity and functional character of those highways.

III.

State police power is conditioned not only by the Fourteenth Amendment to the Constitution of the United States but also by the Commerce Clause of the Constitution. State police legislation inflicting a substantial burden on interstate commerce and transcending the reasonable necessity for its exercise is void under the Commerce Clause. This accepted constitutional principle is also applicable to State legislation limiting the size and weight of motor vehicles engaged in interstate commerce. Measured by this principle, under the evidence in this case, the South Carolina regulations

are void. That the enforcement of these regulations will defeat the purposes of Federal aid to highways and that it will subvert the policies and purposes of the Congress of the United States in its regulation and promotion of motor transport are factors which are relevant in the application of this principle.

IV.

The limitation of injunctive relief by the District Court was not an usurpation of the legislative prerogative, as contended by appellants, but a proper and valid exercise of its broad equitable discretion and was necessary for the protection of the public interests of the State of South Carolina.

I.

THE COMMERCE AFFECTED AND THE BURDEN IMPOSED

Appellees contend, as found by the District Court upon adequate evidence, that the South Carolina regulations, first, will impose a substantial burden upon and drastically interfere with interstate commerce, and, second, arbitrarily transcend the reasonable necessity for their exercise to create the burden. In Section III of this brief it is demonstrated that the concurrence of these two conditions invalidates the regulations under the Commerce Clause. In Section II it is demonstrated that the finding of the District Court as to the second condition was warranted. In Section I will be discussed (A) the commerce affected, and (B) the burden imposed.

A. The Commerce Affected

The commerce affected is the interstate transportation of commodities by motor vehicle over the highways of the nation. The transportation involved is *commercial* as opposed to the use of the highways for *pleasure and travel;* it is the transportation of *commodities* as opposed to the transportation of *persons,* as to which the regulations in issue do not apply. (S. C. Acts, 1933, No. 259, Sect. 2.)

The commerce affected thus involves the use of the highways for *commercial* purposes. Here adversary briefs fall into fundamental error. They attempt to confine the commerce affected and the issues involved to *the use of the highways for gain.* Thus the Illinois brief (at page 20) states:

> "We have already stated that this case does not involve the use of highways for private purposes. It was brought by the operators of motor trucks who use the highways for the purpose of gain,"

and cites *Stephenson* v. *Binford,* 287 U. S. 251, 264; *Packard* v. *Banton,* 264 U. S. 140, 144; *Hodge Co.* v. *Cincinnati,* 284 U. S. 335, 337; and *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583, 592, to the effect that the "primary and preferred use (of the public highways) is for private purpose; and that their use for purposes of gain is special and extraordinary." It is needless to dwell upon the consideration that the cited cases did not involve interstate commerce, were decided under the Fourteenth Amendment, and involved the internal commerce of the States, or to compare the quoted language with the declared purposes of Part II of the Interstate Commerce Act (Motor Carrier Act, 1935.)[1]

The important consideration is that when it referred to the use of the highways for gain as being special and extraordinary this Court referred to the use of the highways by motor carriers *for hire* and not their use by commercial vehicles generally. The legal considera-

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[1] "It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as *to recognize and preserve* the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; *promote* adequate, economical and efficient service by motor carriers . . . develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States. . ." (Sec. 202)

In *Contracts of Contract Carriers,* Ex Parte No. MC-12, decided April 21, 1937, 1 M. C. C. 628, 629, Division 5 of the Interstate Commerce Commission said: "This principle is inherent in the Motor Carrier Act, 1935. The underlying purpose is plainly to promote and protect adequate and efficient common-carrier service by motor vehicle in the public interest, and the regulation of contract carriers is designed and confined with that end in view."

And in *Henry R. Butcher Contract Carrier Application,* No. MC-50170, decided Feb. 15, 1937, 1 M. C. C. 485, 487, that Division said: "It is in conformity with the declared policy to protect the interest of the public by authorizing the continuance of a transportation system which had been built over a substantial period of time. . ."

tions pertinent to the use of the highways by motor carriers for hire are not apposite in this case. The South Carolina regulations are not confined in their operation to carriers for hire, but apply to all who use the highways for the transportation of commodities. Parties to the bill of complaint are not only carriers for hire, using the highways for gain, but shippers and manufacturers making a private use of the highways. The burden which will be created by the enforcement of the regulations will fall heavily upon private users and users for gain alike, as well as upon the cities, ports, localities and the public generally now receiving the benefits of the commerce. The motor carriers for hire, parties to the bill, assert a position and seek a protection in common with all who use the highways for the transportation of commodities, be they private, common or contract carriers. The regulations apply indiscriminately to them all, and no pretense is made that there was a legislative intent that they should be separately applicable to carriers for hire.[1]

Irrespective of the power of a State, since the passage of the Motor Carrier Act, to discriminate between private carriers and carriers for hire in interstate commerce as to size and weight of vehicles, certainly where no discrimination has been attempted and all are regulated as one class, the test of the validity of the regulations is the same as it may affect the one or the other. In seeking the protection of the Commerce Clause against the enforcement of these general regulations, the private carrier occupies no privileged status, nor

[1]It is recognized that trucking for own use constitutes the major part of all trucking operations in the United States. Of the more than 3,500,000 commercial motor trucks registered in the United States in 1935, only approximately 188,809 vehicles were primarily engaged in for-hire operation. "Motor Trucking for Hire, Census of Business, 1935," page 5.

the carrier for hire, because it might have been separately or differently treated, an inferior one.

Neither in the above cited cases, nor in any other decisions has this Court even suggested that the use of the highways for the transportation of commodities was special and extraordinary or subservient to their use for travel or pleasure. Such a theory would be foreign not only to the historical function of land highways, but also to the history and purposes of the existing highway system of this nation.

The commercial transportation of commodities is an historic and primary function of land highways.

The highway is the most ancient avenue of commerce. Its use for the commercial transportation of commodities in local and international commerce has been continuous throughout the recorded history of man. The highways of nations, whether they have been highways of land or sea, or both, have been the most vital elements in their progress and could almost as well as transportation itself be considered the measuring rod of civilization. Coeval with the earliest civilizations in Central Asia were trade and commerce over land highways between Arabia, Babylon, Cashmere, Morocco, Phoenicia, the Far East and the regions of the Nile, and the function of the roads for commercial transport continued to be a measure of the ascendant civilizations of Greece, the Roman Empire, the Middle Ages and modern Europe. The closing of the eastern caravan routes by the Turks sent Columbus westward to America.

During the early development of this country, prior to its independence, the transportation of commodities over land routes played an indispensable part. It was necessary that the inter-coastal commerce and commerce over the inland waterways be integrated by land

routes. The early portages gave way to overland trails and roads. Traders from Virginia who reached far out into Tennessee and Kentucky found competition from those who came down by one of the several routes from the Great Lakes or up from the Lower Mississippi. The purchase of the Louisiana Territory and the extension of settlement of the prairies beyond Missouri, the opening of Oregon and later California, created a demand for transcontinental roads. These roads extending into the Far West were not only for purposes of settlement but were means for going to and coming from fur-trading posts which large companies established throughout the whole Rocky Mountain region. During the same period there were opened up trade and trade routes with the Spanish possessions farther south. The Oregon Trail, the Santa Fe Trail, the Spanish Trail, and the Gila Route had become well known by the early 30's and, until after the development of the trans-continental railroads, carried great quantities of commercial traffic across the continent.

In the meantime the transportation of commodities overland from the Atlantic Seaboard to the Ohio and Mississippi Valley and the prairie country of the Middle West was welding the new nation politically and socially. At the turn of the century pack-horses were giving way to wagons. The business of packing was so widespread and strong that when wagons began to take over the business of trading the packers considered it an infringement upon their vested rights, but because goods could be transported more easily and cheaply by wagon the old had to make way for the new. Wagon roads and at first two-wheel and then four-wheel vehicles made their appearance. This created a demand for better roads. At first the pack train trails were merely widened but about the beginning of the 19th Century Tres-

guet, in France, and MacAdam and Telford, in Great Britain, were building broken stone roads which quickly changed and augmented the internal commerce and industry of those countries. The most populous and wealthy of the Colonies likewise began to consider the road question. A few military roads, such as Braddock's, had been constructed. There was a road along the coast of Massachusetts, and some roads and bridges in the interior; there were roads connecting the larger cities, as from Boston to New York, and from New York to Philadelphia. The first scientifically built hard surface road in America was the Lancaster Turnpike from Philadelphia to Lancaster, which was stoned in 1792 by throwing on it stones of all sizes. These were afterwards removed and stones "passing a two inch ring" substituted. In 1800 Pennsylvania facilitated the construction of a system of turnpikes by granting franchises and subscribing stock, which was eventually to cover the State and control the Western markets. By 1828 there had been 3,110 miles of chartered turnpike in Pennsylvania costing over eight million dollars. These thousands of miles of fine turnpike roads, including many good bridges, placed Pennsylvania in the lead for internal improvements, but other states were similarly employed. New York and New England by 1811 had chartered 317 turnpikes.[1]

In 1816 Virginia appropriated funds "to be used exclusively for river improvements, canals and public highways." South Carolina voted a million dollars in 1818 to be raised in four annual levies for similar purposes. During these years the States were opening public roads, but the only good roads were those built

[1]Gallatin's Report for a Scheme of National Roads and Pavements: Adams' Gallatin, page 315, et seq.)

by the turnpike companies, which erected gates and collected tolls every few miles. The Revolutionary War had shown the need of roadways for quick intercourse between the seaboard and the trans-Alleghany regions. The efforts of the different States, still retaining their colonial jealousies, to secure the control of trade emphasized the need of a unifying influence to bring harmony. Demand was made for national participation. Eminent statesmen, notably Thomas Jefferson, James Madison, Albert Gallatin, and Henry Clay, planned for a national system of internal improvements by roads and canals which would unify the nation and facilitate commerce among the States. In 1808 Albert Gallatin, in compliance with the wish of the Congress of the United States, drew up a scheme for a national system of internal improvements by roads and canals at an annual expense of two million dollars for ten years, but sharp constitutional debate developed as to the power of the Federal Government to make expenditures for these purposes, the war of 1812 brought substantial financial burdens upon the Government, and finally, at the end of the fourth decade of the new century, the inauguration of railway transportation brought an end to this early dream for a national system of transportation by land highway and prevented the contemplated development of North and South routes which we might well believe would have matured in time to prevent the great Civil War, half a century later.[1] However, the accidental entry of the railroad

[1]For this brief consideration of the development of highway transport in America prior to the coming of the railroad, reference has been made to A. B. Hulbert, Historic Highways of America, 16 Vol. 1902-05, A. H. Clark Co., Cleveland, Ohio; A. B. Hulbert, The Paths of Inland Commerce, Chronicles of America Series, Vol. 21, New Haven, 1920; Henry Adams, Life of Albert Gallatin, Vol. I, J. B. Lippincott & Co., Philadelphia; Frederick J. Turner, Rise

into the country's transportation life did not come until after the national government had taken a major part in the development of highway transport and trade between the Eastern States and the Middle West.

The First Era of National Participation in the Development of Interstate Commercial Highways.

On March 29, 1806, President Thomas Jefferson approved a bill appropriating $30,000 for the survey and construction of a road from a point on the Potomac near Cumberland to the Ohio River near Steubenville, later to be known popularly as the Cumberland National Road. Thus the first participation of the national government in the development of interstate commercial highways took the form of actual federal construction, maintenance and control of a connected and improved highway, over 700 miles long, passing through the States of Maryland, Virginia (now West Virginia), Pennsylvania, Ohio, Indiana and Illinois. Permission to build the road was gained of each State through which it passed. The growth of the road was slow after the first appropriation in 1806. In 1811 the first contract was let for ten miles of the road west of Cumberland, Md., its eastern terminus. The road was opened to the Ohio River in 1818.[1]

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of the New West, Vol. XIV of the American Nation Series, Harper & Bros., New York; George R. Chatburn, Highways and Highway Transportation, Thomas G. Crowell Co., New York.

[1] "Thus had the old Indian trail developed into a route for Washington and his band to Fort Necessity; into Braddock's road to Great Meadows; into a pack train trail trampled by thousands of caravan hoofs; and, finally, into a finished paved highway cleared to 66 feet in width, having no grade above 5 per cent which Washington and Jefferson and Madison had visions would be the means of binding together with the strong bands of commerce the cis-and trans-Alleghanian countries." Chatburn, Highways and Highway Transportation, page 64.

Success of the Cumberland road to the Ohio created demands for its extension.[1] In conformity to this demand $10,000 was appropriated in 1820 to lay out a road from Wheeling to the Mississippi River near St. Louis. This continuation was for a road 80 feet wide and in spite of much congressional objection and occasional presidential vetoes, the road was pushed on; the last appropriation being made for a portion west of the Ohio, May 25, 1838. The exact total of all appropriations amounted to $6,824,919.33. The road proper reached southern Illinois. The average load carried by the wagons over the road was 6,000 pounds but loads weighing 10,000 pounds were frequently hauled over the road.[2] The wheels of the freighters were a size proportionate to the rest of the wagon. The first wagons used on the old roads had narrow rims, but it was not long before the broad rims, or "broad tread wagons," came into general use by those who made a business of freighting. The width of the broad tread wheels was four inches.[3]

A toll system was devised based on rates varying according to the wear on the road. Each animal or vehicle was taxed in proportion as it damaged the roadbed. Cattle were taxed twice as heavily as sheep or hogs, and, according to the tariff of 1845, hogs were taxed twice as much as sheep. The tariff on vehicles was determined

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[1]In his last message to the Congress President James Madison invited attention "to the expediency of exercising their existing powers and, where necessary, of resorting to the prescribed mode of enlarging them, in order to effectuate a comprehensive system of roads and canals, such as will have the effect of drawing more closely together every part of the country, by promoting intercourse and improvements and by increasing the share of every part of the common stock of national prosperity." Richardson, Messages and Papers.

[2]Searight, The Old Pike, page 119.

[3]Hulbert, The Old National Road, page 85.

by the width of the tires used, for the narrower the tire the more the roadbed was cut up. Wide tires were encouraged, those over six inches (later eight) went free, serving practically as rollers.[1]

While the passenger traffic on the Old National Road was very extensive, it played the same relation to the freight traffic as passenger traffic does to freight on the modern railway—a small item, financially considered. It was for the great wagons and their wagonners to haul over the mountains and distribute throughout the West the products of mill and factory and the rich harvests of the fields.[2]

The greatest blessing of the National Road was the splendid era of national growth which it hastened. It became a highway for the products of the factories, the fisheries and the commerce of the eastern states. It was one of the great strands which bound the nation together in early days when there was much to excite animosity and provoke disunion.[3]

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[1]Hulbert, The Old National Road, page 66.

[2]Hulbert, The Old National Road, page 84.

[3]On June 6, 1832 the commercial importance of this road was alluded to in Congress by Hon. T. M. T. McKennan, when he said:

> "It is, sir, *a great commercial, military, mail, national work.* To give the House, or those of its members who are unacquainted with the fact, some idea of the immense commercial advantages which the eastern as well as the western country has derived from the construction of this road, let me call their attention to the amount of merchandise transported to the Ohio River in a single year after its completion; and here, sir, I avail myself of an estimate made by an honorable member of the other House on another occasion, when he strongly urged the propriety and importance of the extension of the road through the State of Ohio.
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> "In the year 1822, shortly after the completion of the road, a single house in the town of Wheeling unloaded 1,081 wagons, averaging about 3,500 pounds each, and paid for the carriage of the goods $90,000. At that time there were five other commission houses in the same place, and estimating that each of

Civilization paused but for a moment on the Atlantic seaboard and merely awaited the opening of the National Road. At a critical period in the history of the United States the National Road served the nation well. The population of the three States west of the Ohio through which the National Road ran increased from 783,635 to 3,620,314 in the generation the road was in active use before the advent of railways. The average increase of percentage of permanent population for the first decades in these States was over 182 per decade. In the second decade of the century Indiana's population increased over 500 per cent. The States north and south of the great highway knew little of this marvelous advance. The percentage of increase of population of Virginia decreased 2 per cent, while Indiana and Illinois increased over 300, Kentucky's percentage of increase decreasing 45.[1] The building of the National

them received two-thirds the amount of goods consigned to the other, there must have been nearly 5,000 wagons unloaded, and nearly $400,000 paid as the cost of transportation. But, further, it is estimated that at least every tenth wagon passed through that place into the interior of Ohio, Indiana, etc., which would considerably swell the amount. These wagons take their return loads and carry to the eastern markets all the various articles of production and manufacture of the West—their flour, whiskey, hemp, tobacco, bacon, and wool. Since this estimate was made, the town of Wheeling has greatly enlarged; its population has nearly doubled; the number of its commercial establishments has greatly increased; and the demand for merchandise in the West has increased with the wealth and improvement and prosperity of the country.

"But, further, sir, before the completion of this road from four to six weeks were usually occupied in the transportation of goods from Baltimore to the Ohio River, and the price varied from six to ten dollars per hundred. Now they can be carried in less than half the time and at one-half the cost, and arrangements are in making by some enterprising gentlemen of the West to have the speed of transportation still increased, and the price of carriage diminished." Searight, The Old Pike, page 107.

[1]Hulbert, The Old National Road, page 8.

Road was undoubtedly one of the influences which secured the West to the Union.

In 1838 when the road had reached Southern Illinois a new element entered the industrial world—the successful competition of the railroads. The building of national highways ceased, canal and river transportation were practically put out of business, and for more than sixty years interstate transportation of commodities by highways was unsubstantial:[1]

Lapse of National Interest and Desuetude of Interstate Transportation by Highway.

For approximately sixty years after the coming of the railroads, national interest in the development of interstate highway transportation was dormant. Such transportation itself was unsubstantial and practically non-existent. The expanding development of the nation into the Far West followed the lines of the transcontinental railroads. In the earlier settled parts of the country, too, and especially in the South, communities grew and flourished only if served by these steel lines of transport. But the Pacific Ocean and international boundaries barred the expansive growth of the nation and its growth thenceforward has been inward and interspatial. Communities grew up perforce away from the rail lines, and the transportation needs of

[1]During the heyday of the National Road other interstate roads were busy with the carriage of freight. Various States sought appropriations for these roads, but the more important attempts were vetoed. Jackson, in 1830, vetoed a bill authorizing a subscription by the United States for stock in the Maysville, Washington, Paris, and Lexington Road Company, incorporated in Kentucky, to build a road from the Cumberland Road at Zanesville, Ohio, to Florence, Alabama, on the Tennessee River. A census taken of the existing road showed an average daily traffic of 351 persons, 33 carriages and 51 wagons. Chatburn, Highways and Highway Transportation, page 67.

older rail-served communities began to demand transportation service auxiliary and supplementary to that by rail.[1]

With the turn of the century the new transportation needs of the country nursed the newly developed instrument of commercial transportation, the automobile.

The Modern Renaissance of National Interest and National Participation in the Development of Interstate Transportation by Land Highways.

After a lapse of interest extending over half a century the Federal Government re-entered the field of highway transportation in 1893, first as an educator and adviser to the various States in the science of building good roads, subsequently as a direct participant with the States in financing and integrating a National system of interstate highways, and finally in 1935, in the enactment of Part II of the Interstate Commerce Act (Motor Carrier Act, 1935) assumed plenary responsibility for regulating and promoting the business of interstate commercial highway transportation.

A brief consideration of this history is essential to a proper understanding of the burden which will be inflicted upon interstate commerce by the enforcement of the South Carolina regulations.

Federal Co-operation with the States in Building the Present National System of Interstate Highways.

In 1893 the Office of Road Inquiry was created by the Secretary of Agriculture, under provision of the Ap-

[1]It has been estimated that by 1935, the date of the passage of the Motor Carrier Act, 40 per cent of all communities of the nation and 7,844,509 and 6.3 per cent of the total population, were without railroad service. Automobile Facts and Figures, 1936 Edition. Automobile Manufacturers' Association.

propriation Act for the Department of Agriculture for the fiscal year 1894.[1]

As early as 1903 the subject of Federal aid to State highway work was introduced in the House of Representatives by Walter Brownlow, of Tennessee. In the course of his address Representative Brownlow observed:

> "While the Nation has made more progress than any other nation in the world during that time (last half of nineteenth century) it is a remarkable fact that it is behind all other civilized nations in reference to the improvement of its highways. It seems that by the former policy (direct construction as illustrated by Cumberland Road development) the Government did too much and by the latter policy (nonparticipation) it does too little. There should be a middle ground between those two extremes which would conform to the composite nature of our Government and have a tendency to distribute more equitably its burdens and benefits."

In 1912 a relatively small appropriation of $500,000 was made for the improvement of roads then being utilized and which in the future might be utilized for rural mail delivery, provided that this sum should be matched by the State in double the amount applied by the Government for such improvement. In this year a joint congressional committee was named to " . . . make inquiry into the subject of Federal aid in the construc-

[1] 28 Stat. L. 264, 266. Providing that the Secretary should " . . . make inquiries in regard to the system of road management throughout the United States, to make investigations in regard to the best methods of road making, for traveling and other necessary expenses and for preparing, printing and publishing bulletins and reports on this subject for distribution and to enable him to assist agricultural colleges and experiment stations in dissemination of information on this subject, $10,000."

tion of post roads and to report at the earliest practicable date." This committee approached its task, which consumed almost two years' time, with serious mien and with prophetic insight. Prefatory remarks to the final report state that:

> "The committee undertook this inquiry with full appreciation of its magnitude. Believing that when the United States once entered decisively upon the policy of Federal aid that policy will never be abandoned, we have deemed it of the utmost importance that before any plan shall be adopted or any definite steps taken the subject shall be so thoroughly studied and all the points so carefully considered that the Government will not be carelessly committed to any policy which may lead to unsatisfactory results."

The public interest was identified at the outset with the transportation problem, for it was the view of the committee that:

> "Better, cheaper, and additional transportation facilities in the United States must benefit every inhabitant and result in more development and the greater production of financial resources, meaning more and cheaper food and necessities of life."

Highway transportation was visualized not in the role of an agency whose chief function was to supplement other forms of transport, but rather as an advance in the art of transportation, that is, as a medium which possessed specialized and distinct transport characteristics.[1]

In this connection the Committee observed:

> "Large areas of virgin territory must be developed, first by trail, then by road, next steam rail-

[1] Report to the Select Committee to Investigate the Executive Agencies of the Government, No. 12, p. 7.

road, then electric lines, and finally by a system of intelligently and honestly constructed and maintained wagon roads which in this petrol age with its motor trucks and passenger bus should vastly increase the happiness, prosperity, and comfort of our people and double the value of our agricultural land. A great system of rural transportation would be developed with rates regulated by actual competition open to poor and rich alike, as no expensive and privately owned terminals, roadbeds, tracks, or equipment would be required. The good wagon road would be open everywhere to the use of everybody and the equipment, relatively inexpensive, would be within the means of many."

The Federal Aid Road Act (39 Stat. L. 355) approved July 11, 1916, was the outgrowth of these studies of the Federal Government in the highway field and of public agitation for government funds for highway development. This act (1) appropriated 75 million dollars to be expended over a 5-year period by the Secretary of Agriculture in cooperation with the various States. Funds so appropriated could be applied in the discretion of the Secretary to any roads '. . . over which the United States mails are, or may hereafter be, transported'; (2) it provided an arithmetic formula for the allocation among the various States of total funds available; (3) it conditioned the eligibility of States for Federal-aid funds upon the existence of State highway departments; (4) it enabled the Federal Government to protect its investment in Federal-aid roads by withdrawing future aid from States which failed to maintain these roads according to specified standards; (5) it incorporated the matching system by requiring the State to bear at least one-half the cost of every Federal-aid project; (6) it empowered the Secretary of

Agriculture to make all necessary rules and regulations for carrying out the provisions of the act.

It was provided that "No money apportioned under this Act to any State shall be expended therein until its Legislature shall have assented to the provisions of this Act." By the close of the fiscal year 1917 every State in the Union had given adequate assent to the terms of the Act.[1]

An appraisal of the results and effects of the first year and a half of Federal aid is found in the Report of the Director of the Office of Public Roads and Rural Engineering, 1917:

> "The Federal Aid Road Act marked a long advance in Federal policy covering the improvement of the public highways. For more than 20 years the efforts of the Federal Government had been restricted to research and education for the purpose of developing improved methods of road construction and maintenance and imparting useful knowledge along these lines to local road builders. . . .

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[1] Report of the Director of the Office of Public Roads and Rural Engineering, 1917, page 1.

The assent of the State of South Carolina was given as follows:

ASSENT TO ACT OF CONGRESS—COMPLIANCE THEREWITH.

The assent of the State of South Carolina is hereby given to the terms and provisions of an Act of Congress approved July 11, 1916, entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads and for other purposes," and acts amendatory thereof; that the State Highway Department is hereby empowered and directed to have prepared, and submit all such plans, specifications and data relating to the construction of roads and bridges as may be required under the terms of this chapter; to enter into all contracts with the United States Government and to do any and all things necessary to carry out the provisions of said Act of Congress; and the good faith of the State is hereby pledged to provide sufficient funds to meet the requirements of said Act, so as to acquire the benefits thereof. Civ. C. '22 3065; 1917 XXX 320; 1920 XXX 1, 1072.

> The most important outcome of this Federal legislation was the enactment of State laws providing effective State control of a large measure of road work, making funds available to meet the Federal appropriations, systematizing the work so that there might be definite and correlated results instead of haphazard construction, and finally, strengthening very greatly the States' participation in road maintenance. At the time the Federal Act was passed, the States of Delaware, Georgia, South Carolina, Indiana, Texas and Nevada had no semblance of State highway department. By the close of the fiscal year 1917 every State in the Union had a State Highway Department within the meaning of the Federal Aid Road Act and had given adequate assent to the terms of the Act.
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> . . . From an engineering and construction standpoint one of the results of the Federal Act and of the rules and regulations has been a standardization of form and arrangement for highway plans and specifications. This should in time prove of great value, not only to the Federal Government, but to the States, by way of encouraging simplicity and standardization."

Comparing the magnitude of the early Federal-aid program with the entire highway program of the United States, the significance of Federal-aid is indicated by the fact that the amount of Federal money allotted to projects actually under construction at the end of the fiscal year 1920, *i. e.*, $103,925,094., was only slightly less than the total expenditure of $106,861,053. from State funds for highway construction during the year 1919.[1]

While the Act of 1916 placed a powerful device in the hands of the Federal administrative agency by au-

[1] Report of the Chief of the Bureau of Public Roads, 1920, p. 6.

thorizing it to determine the three vital elements in highway development, *i. e.*, (1) location of projects, (2) physical specifications, that is, type of surfacing, width, strength, elevation, curvature, etc., and (3) priority of projects, it soon became apparent that there were vital defects in the 1916 Act which impeded the development of a uniform and inter-connected system of interstate highways. In the report of the Chief of the Bureau of Public Roads, 1919, he pointed out that the post road requirements handicapped seriously State use of Federal funds.

> "Anyone who is familiar with the rural free delivery routes as now laid out knows that the mail carrier pursuing his zig-zag route does not in many cases follow throughout their length those roads on which traffic is concentrating more and more and which must therefore receive the first attention from the State road authorities." Report of the Chief of the Bureau of Public Roads, 1919.

The Post Office Appropriation Act of Feb. 28, 1919, broadened the definition of rural post roads so as to include the roads over which main traffic might travel. Another vital defect in the 1916 Act was that it did not limit the original State selection to any specified class of road, or to any defined portion of total state mileage. Early in the administration of the 1916 Act it became apparent that something more definite than administrative disapproval of projects selected by States was required if Federal aid was to be effective in guiding individual State activity in the general direction of a connected and uniform road system. At the December meeting of the American Association of State Highway Officials, composed of the administrative and executive officers of all the State Highway Departments,

resolutions were passed urging "that the application of Federal-aid funds be made *to those highways which will expedite the completion of an adequate national system.*[1]

Another defect in the 1916 law arose with regard to maintenance. In the years following the passage of the 1916 Act the Bureau of Public Roads experienced difficulty with the States in the maintenance of the Federal-aid roads. It became necessary to place some States on definite notice that projects were in need of repair and that unless they should be placed in a satisfactory condition within four months no further projects would be approved by the Secretary of Agriculture, and in his Report for the year 1920 the Chief of the Bureau of Public Roads observed:

> "It is reasonable to suppose that with the number of completed projects rapidly increasing there will hereafter be an increasing number of cases of unsatisfactory maintenance," and urged that: "Provision should also be made for the use of Federal funds under the supervision of the Secretary of Agriculture in case a State is dilatory in giving proper attention after notice. . . If it be also provided that no further projects shall be approved in the State until such costs are refunded the tendency will be to avoid the necessity for Federal intervention."

In 1921 the Federal Aid Road Act was amended so as to cure these vital defects. This Act (42 Stat. L. 212), entitled the Federal Highway Act, and approved November 9, 1921, gave purpose and direction to future Federal co-operation with the States and has been

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[1] Report of the Chief of the Bureau of Public Roads, 1920, page 18.

the basic law under which the present interstate connected system of highways has been developed.

It provided (Section 6) that in approving projects to receive Federal aid preference should be given *"to such projects as will expedite the completion of an adequate and connected system of highways interstate in character"*. It specified that the Secretary of Agriculture in co-operation with each State Highway Department should designate a system of highways not exceeding 7 per cent of the total mileage in each State. Application of Federal funds was to be limited to this designated system. Moreover, the make-up of the 7 per cent system was specified by law as follows: the important interstate highways constituting the State primary highway systems could not account for more than three-sevenths of the total mileage of the designated 7 per cent system. The remainder was to be comprised of secondary or inter-county highways. State highway departments were given authority initially to select the mileage to constitute the system, but final approval of the designated system was placed in the hands of the Secretary of Agriculture. (Section 6)

Thus by these provisions it was made certain that the Federal moneys expended in the future would not be dissipated over the State systems without regard to the needs of an interstate system of highways. While by Section 12 of the Act it was provided that the construction and reconstruction of the highways and all contracts, plans, specification, and estimates relating thereto should be undertaken by the State Highway Departments, subject however to the approval of the Secretary of Agriculture, it was provided by Section 8:

> "That only such durable types of surface and kinds of materials shall be adopted for the construction and reconstruction of any highway which is a part

> of the primary or interstate and secondary or inter-county systems as will adequately meet the existing and probable future traffic needs and conditions thereon. The Secretary of Agriculture shall approve the types and width of construction and reconstruction and the character of improvement, repair, and maintenance in each case, consideration being given to the type and character which shall be best suited for each locality and to the probable character and extent of the future traffic,"

and in order to correct the defect of the 1916 Act as to maintenance, by Section 14 it was provided:

> "That should any State fail to maintain any highway within its boundaries after construction or reconstruction under the provisions of this Act, the Secretary of Agriculture shall then serve notice upon the State highway department of that fact, and if within ninety days after receipt of such notice said highway has not been placed in proper condition of maintenance, the Secretary of Agriculture shall proceed immediately to have such highway placed in a proper condition of maintenance and charge the cost thereof against the Federal funds allotted to such State, and shall refuse to approve any other project in such State, except as hereinafter provided.
>
> Upon the reimbursement by the State of the amount expended by the Federal Government for such maintenance, said amount shall be paid into the Federal highway fund for reapportionment among all the States for the construction of roads under this Act, and the Secretary of Agriculture shall then approve further projects submitted by the State as in this Act provided."

This provision is highly important in determining the purpose and legal significance of Federal aid. It

is effective expression of the determination of the Congress that Federal aid was not to be extended to the States without regard to the future permanency of the interconnected interstate highway system. It forestalled the possibility that any State might by abandonment or refusal to maintain the Federal aid highways within its borders disrupt the national highway system and destroy the national investment.

The administration of Section 14 of the Act is described by Thomas H. McDonald, Chief of the Bureau of Public Roads, in "The Bureau of Public Roads and Its Work, Revised, June 30, 1930:"

> "After the construction is completed, the road accepted, and the final payment made from the Federal Treasury, the Bureau still continues its interest. The Federal law requires that the State shall maintain the roads entirely at its own expense; and the Secretary of Agriculture is authorized and directed to enforce this requirement.
>
> To enable him to do so, all completed highways upon which the Federal funds have been expended are inspected by the district forces of the Bureau every six months. The reports of these expenditures are forwarded to the Division of Control. Where the reports indicate unsatisfactory maintenance conditions, that fact is brought to the attention of the State concerned. The State Highway Department is required to give prompt attention to the conditions noted, and the Federal law provides that, if it has not done so within 90 days after it has been notified, the Secretary of Agriculture must make the necessary repairs and charge the cost to the State's apportionment of Federal aid. The Secretary is also required to suspend all further Federal payments to the State until the amount thus spent has been refunded by the State; and when it is refunded *he is required to reappor-*

tion it among all the States. The offending State would thus lose all but its pro-rata portion.

It is significant of the prompt and careful attention given to the maintenance of the Federal-aid roads by the States, that in no State has it yet been necessary to enforce this drastic provision of the Federal law."

By Section 18 it was provided:

> "That the Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Act, including such recommendations to the Congress and the State highway departments as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon;"

and specific provision was also made for the conduct of Federal research (Section 21) independently or in co-operation with the State Highway Departments.

The foregoing constitute the basic statutory provisions under which Federal-aid highway policy has been administered from 1916 to the present time. There have been numerous adjustments in detail but the fundamental principles have remained unaltered with the exception of the recent abandonment of the dollar for dollar matching principle which prior to the "emergency" period had constituted the foundation of Federal-aid policy.

The report of the Committee on Post-offices and Post-roads to the 67th Congress, on June 20, 1921, which preceded the enactment of the Federal Highway Act of 1921, entitled "Continuation of Federal Aid in the Construction of Highways," was an eloquent herald of the new era of national participation in in-

terstate highway construction and promotion of highway transport which was inaugurated by the Federal Highway Act of 1921. It read in part:

"A new era in transportation confronts the United States. An evolution of far-reaching social, political, and industrial importance has been effected through the constantly growing use of highway transport. The modern motor vehicle has rendered obsolete old methods of highway construction, maintenance, and administration. The question is no longer local alone in application; it is national. Obviously our highway policies must be broadened and strengthened to meet this changed condition if public expenditures are to be conserved and the best interests of the Nation cared for. Living costs can be reduced, our defense strengthened, and a new spirit of nationalism created if we use intelligently this new means of communication between communities and States.

"President Harding in his first message to Congress, delivered Tuesday, April 12, 1921, recommended the strengthening of laws governing Federal aid for road construction. In the course of his message he made the significant statement that the principle of Federal aid had been 'acceptably established, probably never to be abandoned.' The President's recommendation concerning highway development is given below:

'Transportation over the highways is little less important (referring to the railways), but the problems relate to construction and development, and deserve your most earnest attention, because we are laying a foundation for a long time to come, and the creation is very difficult to visualize in its great possibilities.

"The highways are not only feeders to the railroads and afford relief from their local burdens, they are actually lines of motor traffic in inter-

state commerce. They are the smaller arteries of the larger portion of our commerce, and the motor car has become an indispensable instrument in our political, social, and industrial life.

"There is begun a new era in highway construction the outlay which runs fa into hundreds of millions of dollars. Bond issues by road districts, counties and states amount to enormous figures, and the country is facing such an outlay that it is vital that every effort shall be directed against wasted effort and unjustifiable expense.

"The Federal Government can place no inhibition on the expenditure in the several states; but, since Congress has embarked upon a policy of assisting the states in highway improvement, wisely, I believe, it can assert a wholly becoming influence in shaping policy.

"With the principle of Federal participation acceptably established, probably never to be abandoned, it is important to exert Federal influence in developing comprehensive plans looking to the promotion of commerce and apply our expenditure in the surest way to guarantee a public return for money expended.'

"The need for a national policy that will develop a connected and correlating system of public highways that will adequately serve the requirements of the whole country and reduce the cost of transportation between producer and consumer, a system that will supplement our great railroad and water transportation, is apparent to every student of this question."

The basic Federal-aid Acts reveal that the Federal Government had abandoned the policy under which it operated during the first half of the nineteenth century. It did not undertake to construct and control national highways, as an exclusive Federal function, despite the fact that the classic constitutional debate over the

power of the Federal Government to construct internal improvements which had embarrassed the first era of national participation had long since been settled by decisions of this Court in favor of the National Government. From 1862 to 1872 four transcontinental railroads had been incorporated by the Federal Government—The Union Pacific, 12 Stat. 489 (1862), the Northern Pacific, 13 Stat. 365 (1864), Atlantic & Pacific, 14 Stat. 292 (1866), and the Texas & Pacific, 17 Stat. 59 (1872). In chartering the latter two companies the Congress did not stipulate that the consent of the States should be secured, and it authorized these companies to exercise the power of Eminent Domain. In *California* v. *Central Pacific RR.*, 127 U. S. 139, (1888) this Court upheld the power of Congress in this regard, Mr. Justice Bradley saying:

> "The power to construct or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce . . . This power in former times was exerted to a very limited extent, the Cumberland or National Road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject."

Instead it entered upon a co-operative undertaking with all the States for the development of a national

inter-connected and interstate highway system which would be doubly valuable because it would be integrated with the various State systems and local feeder and secondary highways.

The most important problem which confronted the administrators of the Federal-aid Act of 1921 was the selection of the 7 per cent of the roads of the Nation which were to receive Federal-aid in the "completion of an adequate and connected system of highways interstate in character." In his report for the year 1923, at pages 2 and 3, the Chief of the Bureau of Public Roads describes the progress of this important function as follows:

> "DESIGNATION OF THE FEDERAL-AID HIGHWAY SYSTEM.
>
> The work of selecting the roads to constitute the Federal-aid highway system, begun during the preceding fiscal year, was continued with all possible expedition consistent with the far-reaching importance of the decisions involved. By the close of the year tentative systems had been submitted by the State highway departments or proposed by the Bureau of Public Roads for all States.
>
> As the result of conferences with officials of the several States and groups of States, 35 of these systems had been definitely approved by the Secretary at the close of the fiscal year, and it was anticipated that the systems of the remaining States would be approved by the fall of 1923.
>
> The total mileage of highways existing in the United States at the time of the passage of the Federal highway act (Nov. 9, 1921), as certified by the State highway departments, was 2,859,575 miles. The maximum mileage that can be included in the system for the whole country, being 7 per cent of the total mileage, is 200,170 miles. The mileage included in the 35 systems approved up to the end

of the fiscal year was 111,699 miles; and as the permissible 7 per cent of existing mileage is, in general, not being included in the system as initially approved, it is not likely that the initial program will include more than 180,000 miles.

Analysis of the approved systems for the 35 States shows that of the 1,111 cities of 5,000 or more population in these States, 1,048 of them lie directly on the approved system, and there is probably not one but will be connected with the system by an improved State or county road. When the system is completed, therefore, one will be able to travel from any town of 5,000 population or greater to any other town of the same size without leaving an improved road.

The detailed study of the availability of the roads to the total population indicates that for the country as a whole it is safe to say that fully 90 per cent of the total population resides not more than 10 miles from the roads included in the system. In individual States the percentage runs almost to 100 per cent; for example, Maryland, in which fully 97½ per cent of the people live within a 10-mile zone on each side of the roads, and Indiana, in which less than 1 per cent lives farther than 10 miles from the roads.

A road of the approved system will cross the western mountains at practically every one of the important passes. The Rockies will be crossed at Berthoud, Lookout, Gibson, Targhee, Pleasant Valley, and Reynolds Passes in Montana and Idaho; La Veta, Wolf Creek, and Red Mountain Passes in Colorado and Raton Pass on the Colorado-New Mexico line. The Cascade Range will be crossed at Stephens and Snoqualmie Passes in Washington and Grants Pass in Oregon, and the Sierra Nevadas will be crossed at Truckee and Walker Passes in California. These passes are the controlling points on the transcontinental routes westward. They are the passages through which

the national roads must cross the mountain barriers. Leading to them from the east and west the roads of the Federal-aid highway system will form a perfect network of interconnected highways branching into every section of the country.

In designing the routes to be included in the Federal-aid system, the chief aim of the States and the Federal agency has been to select routes which will give the maximum of local service and connect with one another to form a great national system of highways."

By 1926 this program was well on its way toward completion:

"The highways included in the system now have an aggregate length of 182,134.8 miles. All have been selected by the constituted State and Federal highway officials as essential links of a system adequate for the accommodation of interstate traffic. Naturally there are degrees of importance even among these selected roads, but compared with the 3,000,000 miles of other highways in the country they are the most important of the Nation's highways and their improvement is absolutely essential for the proper accommodation of interstate highway traffic.

It is entirely consistent with the interests of the Federal Government to participate in the improvement of every mile of the designated system, but that will not be necessary. With negligible exceptions the roads included in the Federal aid system are also parts of the several State highway systems. This is inevitable from the fact that important interstate roads are almost invariably essential state arteries also; and because of its importance to the States a very considerable mileage included in the system had already been improved prior to its designation." 1926 Report of Chief of Bureau of Public Roads, pp. 30-31.

Contrasting the aims under the Federal-aid Act of 1921 with the lack of purpose existing prior thereto, the Chief of the Bureau of Public Roads, in his annual report for 1926, page 31, stated:

> "Ten years ago when the Federal-aid plan was adopted there were only five states in which there was a single improved trans-state highway. They were Massachusetts, Connecticut, New York, New Jersey and Maryland, all eastern states and all of that small group in which the movement for better roads was begun in the 90's. In sixteen states there was then no state highway department, nor the semblance of a plan for development of through routes across the States, and even of those states in which a recently created state agency was feeling its way toward a more scientific and business-like administration of state highways there were few in which the conception of a connected state highway system had yet been clearly apprehended. . . . *It is the primary purpose of the Federal Aid road legislation to expedite the continuous improvement of such cross-state highways in all states and finally to provide a completely articulated system of main interstate highways for the nation. The goal, as represented by the Federal aid highway system, is clearly defined and progress toward it has proceeded for the last five years, at least; without deviation.*"

Between 1916 and October 31, 1936, the Federal Government had paid to the various States the sum of $2,197,634,970.13 and about $500,000,000 had been apportioned, but not paid out (R. 137, 252) for the development of the designated Federal aid system. Far over half of this total sum has been paid to the States during the decade between 1926 and 1936. Thus of the $29,741,137.63 paid by the Federal Government to the State of South Carolina between 1916 and October 31,

1936, over $20,000,000, or more than 70 per cent was paid during the decade between 1926 and 1936.

As a result of this tremendous national investment and combined State and Federal efforts this nation now possesses a national system of improved and interconnected interstate highways, which, from the standpoint of physical characteristics, now permits the relatively unimpeded movement of interstate transportation.[1]

In 1935 by its decision in the case of *Nashville, etc. R. Co.* v. *Walters,* 294 U. S. 405, 417, this Court had occasion to recognize and give definite legal significance to the functional character of the highways composing the national interstate system built up under the Federal Highways Acts. Holding that the functional character of a highway had definite legal significance in determining the power of a State to command a railroad to aid in the construction of an underpass located on such highway, this Court thus described the functional character of Federal aid highways:

> " 'The state highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the federal aid highway legislation. The aim of that legislation is "a connected system of roads for the whole Nation"; "to provide complete and economical highway transport throughout the Nation"; to furnish "a new means of transportation no less important to the country as a whole than that offered by the railroads"; to establish "lines of motor traffic in interstate commerce."

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[1] "Government Activities in the Field of Transportation," Report No. 12 of Select Committee to Investigate Executive Agencies of the Government pursuant to Senate Resolution No. 217 (74th Congress) 1937, page 12.

In the exercise of the power conferred upon the Secretary of Agriculture by Section 8 of the Federal Highway Act of 1921 "to approve the types and width of construction and reconstruction and the character of improvement, repair, and maintenance" of the highways in the 7 per cent system, and in obedience to the mandate of Section 6 to "give preference to such projects as will expedite the completion of an adequate and connected system of highways, interstate in character," the Bureau of Public Roads has successfully obtained substantial uniformity in design and capacity for the main interstate highways connecting the nation. The standard of weight capacity adopted by the Bureau was 16,000 pounds per axle for high pressure and 18,000 pounds per axle for low pressure pneumatic tires (or 8,000 and 9,000 pounds per wheel) and it was for these capacities that the Bureau has designed the main highways in the interconnected interstate system.[1]

In 1934 the Bureau of Public Roads, under authority contained in the Federal Highway Act, 1921, published a "Uniform Act Regulating Traffic on Highways," as revised and approved by the Fourth National Conference on Street and Highway Safety, May 23-25, 1934, which was recommended for adoption by all the States (R. 275). By Section 145 thereof (R. 277) wheel loads not in excess of 8,000 and 9,000 pounds and axle loads not in excess of 16,000 and 18,000 pounds are recommended, depending upon whether high pressure or low pressure pneumatic tires are used.[2]

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[1] Testimony of Thomas H. McDonald, Chief, U. S. Bureau of Public Roads, before the Interstate Commerce Commission, Docket No. 23400.

[2] Appellants (S. C. Br. 17) attempt to minimize the significance of these recommendations by italicizing the phrase "*should not*

As will be seen from the Table of States printed under Section II, subsection B, of this brief, all save a small number of the 48 States had either prior to this recommendation or pursuant thereto, enacted legislation in substantial conformity with its terms.

The Transportation of Commodities over the Interstate Highways

In pace with the development of the national system of interstate highways has been the revival of interstate transportation of commodities over the land highways, and today that transportation is playing a part in the nation's development and civilization even greater than it played in the early decades of the Republic. The transportation of passengers over the land highways has also kept pace with the development of the roads, but that commerce is not affected by the regulations in issue and need not be described here.

Accurate statistical knowledge is not yet available as to the extent of the interstate transportation of commodities over the highways, but existing estimates indicate its scope and importance.

In Coordination of Motor Transportation, 182 I. C. C. 263, 400-406, the Interstate Commerce Commission estimated that in terms of ton-miles "intercity trucks" carried, during the year 1929, 4.2 per cent of the total domestic freight, excluding that moving in the coastwise and intercoastal trades. This represented 5.8 per cent of the ton-mile traffic of the railroads, and 18.3 per cent of rail traffic in terms of tons originated.

In the Second Report of the Federal Coordinator of

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exceed" which is employed in Section 145 of the proposed Uniform Act. However, when it is considered that Section 145, like the rest of the Uniform Act, was drafted in statutory terms for verbatim adoption, it is apparent that appellants' suggestion is of no force.

Transportation (1934)[1] it was estimated that during the year 1932, in terms of ton-miles "intercity trucks" carried 9.4 per cent of the total domestic freight and 23.8 per cent of the total tonnage originated, and (on page 18) it was stated that "an estimate of the aggregate volume of motor truck traffic handled outside the strictly local haulage area indicates that in 1932 truck traffic was about 44 per cent of rail in terms of tons originated, and 12.7 per cent in terms of ton-miles."

In Coordination of Motor Transportation, *supra,* at page 274, it was estimated that 20 per cent of all truck traffic is interstate.

The percentages of ton-mile, ton-originated, and proportionate interstate traffic thus estimated for the period 1929-1932, have undoubtedly increased in the past five years and especially since the Federal regulation and promotion of the industry under Part II of the Interstate Commerce Act (Motor Carrier Act, 1935).

While it is recognized that private transport constitutes the major part of all the highway transportation of commodities in the United States,[2] a fair estimate of the extent of the interstate motor truck transportation can be had from the census taken of motor trucking for hire in the United States for the year 1935 by the Bureau of the Census, published in its report of May, 1937, cited in the note below.

Indicative of the importance of interstate motor trucking for hire is the fact that, while only 8.7 per cent of the trucking concerns subjected to the census were primarily engaged in interstate commerce, 16.7 per

[1] Senate Document No. 152, 73d Congress, 2d Sess., page 3.

[2] "Motor Trucking For Hire," Census of Business, 1935, Bureau of the Census, May 1937.

cent in intrastate, and 74.6 per cent in local operation, *in terms of annual revenue* (total for the nation $530,860,000) local operators accounted for only 38.4 per cent of the total ($204,127,000), intrastate 24.7 per cent ($131,017,000) and interstate operators accounted for 36.9 per cent of the total ($195,716,000). Of the 61,216 for-hire concerns in the nation, 45,685 were local, 10,217 were intrastate, and 5,314 were interstate. Of the total of 188,809 vehicles for-hire in the nation, 49,848, or over 25 per cent, were used primarily in interstate commerce. Of the total of 21,440 tractors and 23,594 semi-trailers used in the nation, 11,288 tractors and 11,776 semi-trailers were used primarily in interstate commerce. Thus over 50 per cent of the tractor semi-trailer combinations in the nation were used in interstate commerce. In computing the number of vehicles, tractors and semi-trailers were counted as separate units. Therefore, of the 49,848 vehicles for hire used in interstate commerce, approximately 23,004 were tractor semi-trailer combinations, representing over 45 per cent of the total. These figures are of fundamental importance in this case, for as shown in subsection (B) of this Section, and in Section II of this brief, the enforcement of the South Carolina regulations will in effect bar the tractor semi-trailer from the interstate highways into, from and across South Carolina.

Concerns primarily engaged in interstate operation received 87.8 per cent of their total revenue from interstate, 7.4 per cent from intrastate, and 2.9 per cent from local trucking operations. Revenue of interstate operators from all sources amounted to $3,926 per vehicle, as compared to $2,120 for local and $3,069 for intrastate operators.

Federal Regulation and Promotion of Transportation over the Land Highways

The effects of the modern development of highway transportation upon the general structure of the transportation systems of the country made it inevitable that the Federal Government should not long delay placing it under Federal control and regulating it in the public interest.

Demand for this regulation came from various sources. It arose in States whose authorities had felt the urgency of control over the use of the highways and the inadequacy of state measures. It developed strongly in the course of time in the minds of railroad officials who sought to subject their motor vehicle competitors to regulation similar to that under which they functioned. It found willing advocates in the motor vehicle industry itself on the part of operators and their associations dissatisfied with the chaotic condition resulting from uncontrolled competition.[1] It was voiced by many shippers who preferred an ordered transportation system to the unstable and uncertain conditions which had developed in motor carrier transportation. It was advocated by the Interstate Commerce Commission,[2] and

[1] Regulation of Transportation Agencies (S. Doc. 152, 73d Congress, 2d Sess. 1934, p. 25).

[2] The Interstate Commerce Commission had made two extensive investigations of the motor transport industry, *Motor Bus & Motor Truck Operation*, 140 I. C. C. 685, decided April 10, 1928, and *Coordination of Motor Transportation*, 182 I. C. C. 263, decided April 6, 1932. Out of each of these investigations grew recommendations for legislation. The Commission had also had occasion to consider the problem created by motor competition in two general investigations of the railroad rate level, *Fifteen Percent Case*, 1931, 178 I. C. C. 539, and *General Rate Level Investigation*, 1933, 195 I. C. C. 5.

by the Federal Co-ordinator of Transportation after exhaustive studies.[1]

After almost a decade of operation and study, Congress in the course of its 1935 session amended the Interstate Commerce Act to provide for extensive motor carrier regulation.[2]

The new Act by its terms became Part II of the Interstate Commerce Act.

Passage of the Motor Carrier Act paralleled in some respects the first regulation of railroads in 1887, in that it was adopted after extensive but ineffective regulation by the States which preceded the gathering and crystallization of sentiment sufficient to move Congress to act. By the time the Act was passed common carriers of passengers by motor vehicle were regulated in 47 States and the District of Columbia, common carriers of property in 42 States and the District, contract carriers of property in 31 States, and private carriers of property in 8 States. Regulatory laws were in effect in the principal foreign countries. There is further parallel in the way in which the experience of the States and of foreign countries in meeting the world-wide problem of motor transportation by highway was availed of in the formulation of the Federal statute. But the parallel cannot be pushed too far. The Interstate Commerce Act as originally passed took up only a few pages in the Statutes at Large and was a mere skeleton of the present act. It was experimental and was gradually expanded to its present form by a long series of amendments each of which was thought to be justified by practical experience in the operation of the statute.

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[1] Regulation of Transportation Agencies (S. Doc. 152, 73d Cong., 2d Sess. 1934).

[2] 49 Stat. L. 543, Short title, "Motor Carrier Act, 1935."

Part II of the Interstate Commerce Act presents a striking contrast; it does not represent a cautious and experimental approach to the regulation of common carriers by highway, but an ambitious and detailed scheme for the control of their operations in the public interest. Not only has the experience of the States and of foreign countries been drawn upon, but, more heavily still, the experience of the Federal Government itself in the regulation of the railroads. Many of the provisions are taken almost bodily from the Interstate Commerce Act. It is not going too far to assert that the portions of the Motor Carrier Act dealing with common carriers are modeled upon the Interstate Commerce Act with deviations from its provisions only where necessary to adapt this new statute to the special problems of highway transportation. Even with respect to contract carriers the statute sets up a rather well-rounded scheme of regulation, and there is experimental approach and tentative beginnings only in connection with private carriers. The primary object of the Act is to regulate common carriers by motor vehicle operating in interstate and foreign commerce, including both buses and trucks. They are subjected to a comprehensive scheme of regulation almost as extensive as the regulation of interstate railroads, which long has been in effect. Nearly every phase of their activity is brought under control: rates, tariffs, divisions, service, safety, security for personal injuries and property damage, accounts, security issues, extensions of line, purchase, control and consolidation, and the qualifications and maximum hours of employees.

Many of the provisions regulating common carriers by motor vehicle are likewise made applicable to contract carriers, including those relating to a uniform

system of accounts, records, and reports, qualifications and maximum hours of service of employees, safety of operation and equipment, consolidation, merger and acquisition of control, issuance of securities, and provisions of security for the protection of the public. The rates of contract carriers are also made subject to regulation, although not in the same way or to the same extent as in the case of common carriers. Maximum charges are not under the control of the Commission, but it is authorized to fix the minimum charge to be made by any contract carrier, whenever it finds that the existing charge contravenes the policy of the Act as declared in section 202(a).

A private carrier is subject to regulation only with respect to qualifications and maximum hours of service of employees and standards of equipment, and then only after a finding by the Commission that there is need therefor in the interests of safety of operation.

A far-reaching innovation in procedure was undertaken to avoid too much centralization of administration in Washington, to avoid the necessity for an undue enlargement of the forces of the Commission, and more effectually to secure the co-operation of the State commissions with their intimate knowledge of local conditions. It consists of a provision for reference, in the first instance, of a wide variety of matters to joint boards composed of representatives of the State commissions in the territory affected by the proceeding. Where not more than three States are involved, the reference to a joint board is mandatory, and where more than three States are involved, it is discretionary. The classes of cases in which such reference is to be made are those involving applications for certificates, permits, or licenses, the

suspension, change or revocation thereof, applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts, complaints as to violations by motor carriers or brokers of the requirements established under section 204(a) relative to service, safety, accounts, records, reports, qualifications and maximum hours of service of employees, and complaints as to rates, fares and charges of motor carriers, or the practices of brokers.

The Interstate Commerce Commission is given control over the inauguration and abandonment of service and is empowered to deny the use of the highways to applicants who propose to inaugurate new common carrier service (after June 1, 1935) if it finds that the "present or future public convenience and necessity" (Section 207 (a)) does not or will not require such service, and to applicants who propose to inaugurate new contract carrier service (after July 1, 1935) if it finds that such service is not or will not be consistent with the public interest and the policy declared in Section 202(a) of the Act. (Section 209(b))

However, and with special significance to the determination of the issue in this case, the Act is not merely one of regulation. The purpose of the Congress not only to regulate, but to promote and foster a national highway transportation system, is clearly and forcibly expressed in the declaration of policy (Section 202(a)). This purpose is expressed in concrete terms and tied into many provisions of the Act which refer to the statement of policy in Section 202(a) as the standard by which the Commission is to be governed. This declaration of policy is as follows:

> "It is hereby declared to be the policy of Congress to regulate transportation by motor carriers

in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part."

The Act provides by Section 206(a) that common carriers in bona fide operation on or prior to June 1, 1935, and by Section 209(a) that contract carriers in bona fide operation on or prior to July 1, 1935, may continue to so operate without obtaining certificates of public convenience and necessity, or permits, respectively. By February 12, 1936, the statutory deadline, 75,977 motor carriers of property, and 2,842 motor carriers of passengers had filed applications seeking these "grandfather rights."[1]

Since the enactment of the Motor Carrier Act the Interstate Commerce Commission has made rapid progress in organizing and regulating motor carriers in the public interest and the policy of Congress declared in Section 202(a) as above set forth has been progressively advanced. Already two volumes of motor car-

[1] Fiftieth Annual Report of the Interstate Commerce Commission, November 1, 1936, page 70.

rier decisions have been completed and a third and fourth are being written.[1]

The legal pertinency to the issues in this case of the enactment and policies of the Motor Carrier Act is discussed hereafter in Section III(C) of this brief. The above discussion of the background, enactment and policies of the Act has been included in this section in order to identify and describe the interstate commerce which will be affected by the enforcement of the South Carolina regulations.

It demonstrates that a century after the first era of national participation in transportation over land highways the national government has re-entered the field of highway transport by cooperating with the 48 States in planning and building a national system of interconnected interstate highways adequate to carry the commerce which by the Motor Carrier Act it seeks to regulate, foster and promote in the public interest.

The Interstate Transportation of Commodities Over Land Highways in the South Atlantic Region Involving the Use of Interstate Highways Into, From and Across the State of South Carolina

In the development of the national interstate highway system and the growth of commercial highway transport over it, the South Atlantic region of the

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[1]Current appraisals of the Motor Carrier Act may be found in Michigan Law Review, Vol. 34, No. 1, Nov. 1935, page 37; Government Activities in the Field of Transportation, Report No. 12 to the Select Committee to Investigate the Executive Agencies of the Government, pursuant to Senate Resolution 217, 74th Cong., 1937, page 1-15; McCollester and Clark, Federal Motor Carrier Regulation, 1935; Report of the Special Committee of the Section of Public Utility Law of the American Bar Association, "To Appraise the Regulation Thus Far of Motor Vehicles by the Interstate Commerce Commission," 1937.

United States has played its full part. The District Court found upon abundant evidence (R. 65) that

> "Within the past decade there has been a great development of interstate commerce by truck, and a corresponding change and development of industry in the southeastern part of the United States based upon truck transportation. The market gardening industry, the textile industry, the fertilizer industry and many others have changed in large part their method of doing business as a result of the facilities afforded them by the use of trucks in interstate commerce."

and (R. 65-66):

> "The evidence establishes that South Carolina has the best highway system to be found in the southeastern part of the United States. There are within the state 60,000 miles of roads of all kinds, of which 5,948 miles are embraced in the State highway system. Of these, 2,417 miles are of standard pavement; and the arteries of interstate commerce to which we have referred are of this character with the exception of a few short lengths, as for instance 6 or 7 miles in highway No. 1 near Cheraw, out of a total length of the highway of 140 miles or more. The standard paving is not materially different from modern pavement used in most of the other states of the Union, is 18 or 20 feet in width, 7½ or 8 inches thick at the edges and 6 or 6½ inches thick at the center. It is capable of sustaining without injury a wheel load of 8,000 or 9,000 pounds and an axle load of from 16,000 to 18,000 pounds."

In the Census of Motor Trucking for Hire for the year 1935 [1] it was found that the relative importance of

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[1] Census of Business, 1935, Bureau of Census, May 1937, page 7.

concerns engaged primarily in local, intrastate, and interstate trucking varied considerably in different regions. The South Atlantic region was one in which interstate trucking was preponderant. Interstate truckers in that region did 53.8 per cent of all for-hire trucking. Of the total annual revenue of for-hire trucking in that region ($38,138,000) local trucking accounted for only $10,457,000, intrastate only $7,172,000, while the annual interstate revenue was $20,509,000. Of this total of $20,509,000 interstate revenue the proportionate share of the State of Florida was $1,032,000, Georgia $1,269,000, South Carolina $994,000, North Carolina $4,389,000, Virginia $3,727,000, and Maryland $6,626,000. However, the low interstate revenue for the State of South Carolina does not reflect the amount of interstate traffic on its highways, for by this census, revenue was allotted to States in which the home office of the company was located, and consequently much revenue collected from operations into, from and across the State of South Carolina was allotted by these figures to other surrounding states, notably North Carolina. Thus among the plaintiffs in this case are Barnwell Bros. Inc., Horton Motor Lines, Inc., National Convoy & Trucking Company, and Carolina Transfer & Storage Co., common carriers, and Akers & Hudson Motor Lines, Inc., contract carriers, with their principal offices in the State of North Carolina. The evidence showed that these plaintiffs were furnishing door to door delivery and daily direct service in interstate commerce throughout the East.

While the record shows that a great quantity of interstate truck traffic originates in and is destined for the State of South Carolina, it is also apparent from the geographical location of the State that large quan-

tities of interstate traffic originating in and destined for the States of Florida and Georgia must traverse the highways of South Carolina. The extent to which this is true for the State of Florida, is revealed in a study of Florida traffic conducted by the Florida State Road Department and the Bureau of Public Roads, from Sept. 1933 to Sept. 1934, extracts from which were published in "Public Roads", Volume 16, No. 4, June 1935, by the Bureau of Public Roads. It is stated therein that:

> "During the season of 1933-34 the interstate truck shipments aggregated 31,590 truck loads. These truck shipments were destined mainly to Georgia, South Carolina, Alabama, North Carolina, Tennessee, the District of Columbia, and Virginia, with the number of trucks in the above order. The States enumerated took about 88 percent of the total interstate truck shipments. In the total movement, all States east of the Mississippi River except the New England group and Delaware were represented, while west of the Mississippi only the States of Missouri, Arkansas, Texas, and Louisiana received truck loads of citrus fruits from Florida. Georgia and South Carolina accounted for more than half the total interstate citrus fruit shipments by truck. . . . "15 percent of the 215,000 outgoing trucks crossing the Florida State line during the year carried citrus fruits; 8 percent carried garden produce; 40 percent carried miscellaneous commodities; and 37 percent were empty. Figure 5 indicates the seasonal movement of these trucks and the shifting from citrus fruit hauling to the transportation of garden produce.
>
> U. S. 1, U. S. 17, and U. S. 41 were the major gateways through which these commodities moved, these three routes together carrying 82 percent of all citrus fruit shipped to other States by truck

and 82 percent of the interstate garden-produce shipments.

More than 80 percent of all trucks crossing the State border and carrying citrus fruit was registered in States other than Florida. Seventy-one percent of trucks carrying garden produce in interstate commerce was also registered in other States.

Fifty-two percent of all trucks used in the carrying of citrus fruit had capacities of 2 to 4 tons; 40.5 percent were in excess of 4 tons; while 7.5 percent had capacities up to and including 1½ tons."

The enactment of State laws barring interstate motor transportation between the North and the South—"The Second Mason-Dixon Line."

In the years 1931 and 1932 laws were enacted in the States of Kentucky, Tennessee and South Carolina regulating the size and weight of motor vehicles whereby maximum gross weights far below the previous limitations were adopted, axle weights were to be ignored; tractor-semi-trailers were to be considered as one unit for the determination of gross weight. Thus, by a singular and curious coincidence a barrier, extending from the Atlantic Seaboard to the Mississippi River, was threatened which would bar the flow of interstate commerce by motor truck between the North and Middle West and the South. Among traffic men of the country the wall thus created around the borders of these States has been referred to sardonically as "the second Mason-Dixon line" (R. 155). The only avenue to the South is by way of the narrow gap in southwestern North Carolina where it is contiguous to the State of Georgia. The one road through this gap is "a narrow road, full of short curves and mountain climbs

which make it a very hazardous highway for trucks of any size to travel." (R. 216)

The barrier which the South Carolina regulations attempt to erect against traffic moving along the Atlantic Seaboard, the "Chinese wall" which the District Court referred to in its opinion (R. 75), is graphically apparent from Table I.

TABLE I.

PRACTICAL WEIGHTS AND WIDTHS OF CONVENTIONAL INTERSTATE MOTOR EQUIPMENT

Under Axle and Gross Weight Restrictions of States Along the Atlantic Seaboard

(For basis of adjustment, when made, between legal and practical limitation, See Note, Table of 48 States, Subsection B, Section II)

State	Legal Axle Weight in pounds	Practical Gross Weight in Pounds 4-wheel truck	6-wheel truck	Tractor Semi-trailer	Legal Width In inches
New York	22,400	36,000	44,000	45-50,000	96
New Jersey	Varies[1]	30,000	40,000	60,000	96
Pennsylvania	18,000	26,000	36,000	39,000	96
Delaware	18,000	26,000	36,000	40,000	96
Dist. of Col.	24,640	30,800	39,600	39,600	96
Maryland	NR	25,000	40,000	40,000	96
West Virginia	16,000	24,000	35,000	45,000	96
Virginia	16,000	24,000	35,000	35,000	96
North Carolina	18,000	24,000	40,000	40,000	96
South Carolina	NR	20,000	20,000	20,000	90
Georgia	17,600	22,000	39,600	39,600	96
Florida	T 500[2]	22,000	22,000	34,000	96

NR No regulation.

[1] 1400-17,200 pounds per wheel according to number and size of tires.

[2] 500 pounds per inch of tire width.

B. The Burden Imposed

The evidence of record and the Court's findings of fact are eloquent as to the disastrous burden which the enforcement of the South Carolina regulations will inflict upon this commerce. While appellants did not attempt to contradict this evidence and did not except

to the District Court's findings in this respect, they attempt (S. C. Br. 119, 120; Rd. Br. 89) to minimize its importance by calling this Court's attention to certain statistics set out in Defendants' Exhibit No. 13 (R. 272) which show that according to registration figures of the South Carolina Motor Vehicle Division, there are relatively only a very few vehicles of a registered capacity beyond the 20,000 pounds gross which will be permitted by the law. But that these registered figures do not reflect the true capacity of *interstate vehicles* using these roads is attested by every operator or shipper who took the stand, and upon abundant evidence the District Court found to the contrary, and the appellants did not except to these findings. Appellants' use of these registration figures ignores the fact, as shown throughout the evidence, that by far the greater number of vehicles using the interstate highways into, from, and across the State of South Carolina would be registered not in that State, but in North Carolina and other States where their owners are resident.

The findings made by the District Court to which the appellants took no exception are as follows:

> "7. That the interstate motor transportation industry has grown and developed in the past five years to be an established industry. That standard equipment operated by motor carriers in interstate commerce consists of trucks and tractor semitrailers, and that 85 per cent to 90 per cent of this equipment is 96 inches in width and weighs more than 20,000 pounds gross; that enforcement of the South Carolina law would result in the obstruction of the flow of interstate commerce into, out of, and across the State of South Carolina because it would necessitate the transferring of commodities to and from trucks of the size and weight prescribed by said law, with a consequent increase in

the cost of interstate transportation and discrimination against South Carolina shippers and others shipping into and across South Carolina, and would render it practically impossible for a large part of interstate commerce now conducted by truck to use the roads of that state." (R. 78.)

"8. That weight and size of motor trucks are important factors in the fixing of interstate rates and that enforcement of the South Carolina law under consideration would necessitate increase of rates for transportation of commodities into, out of, and across South Carolina, would prevent the interchange of motor truck equipment and the establishment of through routes and joint rates on shipments moving into, out of, and across South Carolina." (R. 78.)

"9. That the development of motor truck transportation has been of great benefit to the textile industry because it has permitted manufacturers to supply customers with commodities in smaller quantities at more frequent intervals, without increased cost, and the customers' demand for this service necessitates the use of motor trucks. That the standard motor trucks supplying this service are 96 inches in width and when properly loaded weigh more than 20,000 pounds gross. That enforcement of the South Carolina law would cause delay in transit and increase the cost of interstate transportation of textiles into, out of and across the State of South Carolina and would result in discrimination against South Carolina textile mills in favor of competitors in other states." (R. 78.)

"10. That the continued operation and development of large-scale truck farming and the shipping of vegetables out of South Carolina in interstate commerce is dependent upon the peculiar service rendered by motor trucks in the transportation of

produce from roadside farms to large and distant markets quickly and economically. That truck farmers and vegetable growers depend, for interstate transportation of their produce, on motor trucks operated not by the farmers themselves but by transportation companies whose trucks move about the country with the seasons. That these trucks, and particularly the refrigerator trucks upon which the farmers depend for shipment of perishables, exceed the size and weight limitations prescribed by the law of South Carolina. That enforcement of the said law would discriminate against South Carolina truck farmers and vegetable growers in favor of their competitors in other states and would injure if not destroy this industry in South Carolina." (R. 79)

"11. That a large amount of fertilizer is shipped out of South Carolina in interstate commerce by motor truck and delivered to farmers at the field for immediate use; that this service cannot be rendered by other transportation agencies; that the product has a low value in proportion to weight, and enforcement of the South Carolina law would increase the cost of fertilizer to consumers and jeopardize the fertilizer industry in South Carolina." (R. 79).

"12. That interstate movement of household furniture and effects by motor truck has developed with the advent of good roads; that railroads do not offer adequate service and do not compete with trucks in this business; that because of the weight and bulk of furniture it is necessary that loads exceed the size and weight limitations prescribed by the law of South Carolina; that enforcement of the South Carolina law would increase the cost and curtail the efficiency of this service to the public." (R. 79)

"13. That the business of shipping lumber in interstate commerce from mills in South Carolina

has developed with the advent of good roads and motor trucks; that motor transportation enables the mills of South Carolina to meet the demand of customers for delivery of lumber at the point of use; that if the South Carolina law is enforced the interstate movement of this commodity by truck will practically cease and South Carolina lumber mills will be forced to ship by rail at increased cost of transportation and serious curtailment of service both in time and convenience to the consuming public." (R. 79).

"14. That with the advent of good roads and motor truck transportation the furniture manufacturers have changed their method of doing business and have commenced shipping large quantities of furniture in interstate commerce by motor truck; that this method of transportation is now important because customers demand quick shipments in small lots and this service cannot be supplied by railroads; that the transportation of this commodity necessitates the use of trucks 96 inches in width and weighing more than 20,000 pounds gross; that enforcement of the South Carolina law under consideration would interfere with the traffic and would result in discrimination against manufacturers shipping furniture out of and across South Carolina in favor of their competitors." (R. 80.)

"15. That the port of Charleston, S. C., handles a large volume of inbound and outbound traffic moving in interstate and foreign commerce; that in recent years the percentage of this interstate and foreign traffic moving to and from the port of Charleston in motor trucks has steadily increased, and at the present time the records of three of the important inter-coastal steamship lines operating in and out of Charleston reflect, respectively, 24 per cent, 58 per cent, and 40 per cent of all tonnage moving by truck; that shippers and consignees

rely upon and demand the service now offered by motor trucks because of advantageous rates and because motor trucks offer transportation facilities which cannot be duplicated by other transportation agencies; that motor trucks now operating in and out of Charleston and carrying cargoes in interstate commerce to and from the port are of the standard type, 96 inches in width and weighing more than 20,000 pounds gross; that many of the commodities moving in interstate commerce by motor truck to and from the port of Charleston cannot be profitably transported in trucks within the weight and size limitations prescribed by the law of South Carolina; that enforcement of the South Carolina law would result in the diversion of large cargoes, normally consigned to the port of Charleston, to other competing ports in other states along the Atlantic seaboard." (R. 80.)

"16. That flour is one of the major commodities moving into the port of Charleston and that a large part of it is transported in interstate commerce by motor truck; that truck transportation of this commodity is necessary because speed of delivery is essential to prevent deterioration and meet the demand of customers and also because numerous small communities are dependent on shipments in smaller quantities than can be profitably shipped by rail; that the average pay load of a motor vehicle hauling flour is 20,000 pounds, making a gross load of about 30,000 pounds, that enforcement of the law under consideration will increase the cost of transportation." (R. 81.)

Rates

The effect of the enforcement of the South Carolina regulations upon common carrier rates is vividly portrayed by two illustrations in the testimony of Emory A. Boudreau, Assistant Chief, Section of Traffic,

Bureau of Motor Carriers, Interstate Commerce Commission (R. 140) (estimated rates based on cost of operation and not competition):

> "Now the shortest distance over paved road from Asheville, North Carolina to Athens, Georgia, is by Greenville, South Carolina, for a distance of approximately 163 miles. A common carrier restricted to 40,000 pounds gross weight could handle canned goods, we will say, from and to these points at the rate of 19.07 per hundred pounds. If he was restricted to a 20,000 pound gross weight, because of its travel through the northwest corner of the State of South Carolina, he would require a rate of 38.08 per one hundred pounds."
>
> "The distance from Richmond, Virginia, to Wadesboro, North Carolina, is approximately 290 miles. Between Richmond, Virginia, and Cheraw, South Carolina, the distance is approximately 292 miles. Now while the carrier operating between Richmond, Virginia, and Wadesboro and restricted to 40,000 pounds gross weight would require a rate of 35 cents per one hundred pounds, on the same commodity between Richmond and Cheraw, because of the 20,000 pounds gross weight restriction, he would require a rate of 67.07 or a difference of 32.02 per one hundred pounds for approximately two miles further to a South Carolina point."

The 90 Inch Width Limitation

That provision of the South Carolina regulations which will inflict the heaviest and most disastrous penalty on interstate commerce, and in effect will amount to a discrimination against interstate commerce, is Section 6 which provides a 90 inch width limitation on all motor vehicles. (Finding of Fact No. 24, R. 83).

This follows from the fact that all of the States of the Union except South Carolina allow a width of 96 inches

(See Table of States, Subsection B, Section II of this Brief).

The evidence plainly shows, and the District Court found (Finding of Fact No. 20; Opinion, R. 67) that from 85 per cent to 90 per cent of all vehicles now being built and used in interstate commerce have a standard width of 96 inches (R. 155).

The enforcement of this limitation will require private and for-hire carriers no matter in or to what State their shipment originates or is destined, to provide specially built trucks if their shipments are to be routed into, from, or through the State of South Carolina.

Its enforcement will amount to severe discrimination against shippers and operators in South Carolina's neighboring States, as well as those in other States, seeking to compete with intrastate operators in South Carolina, for they will be forced to provide themselves with an entirely different set of vehicular equipment from that which they now possess in order to get into the State of South Carolina at all.

Regardless of the justification for this result (which is shown not to exist in Subsection B of Section II of this Brief) certainly it will be true of interstate commerce in the South Atlantic region, what this Court said in *Hall* v. *DeCuir*, 95 U. S. 485:

> "Commerce cannot flourish in the midst of such embarrassment."

Attempt of South Carolina Legislature to Prevent the Threatened Burden

In May 1937 the General Assembly of South Carolina sought to prevent the threatened disaster to interstate commerce and the welfare of the State of South Carolina by enacting an "Act to Regulate and Limit the Use of Highways" (See Appendix I of this Brief)

which would permit axle weights of 16,000 pounds on high pressure and 18,000 on low pressure pneumatic tires, 30,000 pounds gross weight for single units, and 45,000 pounds gross weight for combinations. These limitations were to be applicable on all the highways of the State and not alone upon the main interstate highways as to which the enforcement of the 20,000 gross weight limitation on all vehicles was enjoined by the District Court. Unfortunately, however, this attempt, which would have rendered this appeal moot, was vetoed by the Governor of South Carolina on May 18, 1937 and this veto was sustained by the House. Citizens of that State, and other States, vitally affected by the threatened enforcement of the regulations in issue, have no recourse other than to claim in this Court the constitutional protection afforded by the Commerce Clause of the Constitution.

II.

BURDEN UPON INTERSTATE COMMERCE WILL BE ARBITRARILY AND NEEDLESSLY IMPOSED

In Section I we have shown that the enforcement of the South Carolina regulations will impose a substantial and drastic burden on interstate commerce amounting to a regulation in fact. In Section III we demonstrate by established constitutional principle that if such burden is arbitrarily and needlessly imposed, the regulations are regulations of interstate commerce in the constitutional sense and are void. In Section II it will be shown that these regulations, as applied to the main interstate highway system, are arbitrarily and needlessly imposed, transcending the reasonable necessity for their exercise, (A) irrespective of the physical capacity or character of the highways, and (B) a fortiori, because of the capacity of the highways and their functional character.

A. Irrespective of the Physical Capacity or Functional Character of the Highways, the Weight Regulations Arbitrarily and Needlessly Exceed the Reasonable Necessity for their Exercise.

Irrespective of the physical capacity or functional character of the highways, the South Carolina weight regulations are restrictive to an arbitrary and needless degree. Whether or not (in the light of the pronouncements of this Court in *Sproles* v. *Binford,* 286 U. S. 374) the extent to which they thus exceed the reasonable necessity for their exercise would be sufficient to

invalidate them because of the burden which they will inflict upon interstate commerce, it is unnecessary in this case to decide. Their unreasonableness in this regard, coupled with the extent to which they exceed their reasonable necessity when the physical capacity and functional character of the main interstate highway system are considered, takes them out of the scope of this Court's decision in *Sproles* v. *Binford, supra,* and leaves no doubt as to their invalidity.

Since there is no dispute that gross weight in some respects is important in connection with the use of bridges (Finding of Fact No. 25) and that the width of vehicles must be reasonably adjusted to the width of highways, discussion of these two subjects is considered under subsection B of this Section where the reasonableness of the regulations is considered in relation to the physical capacity and functional character of the class of highways affected by the District Court's decree.

Section 4 of the South Carolina Act, prescribing a gross load of 20,000 pounds, is arbitrary and unreasonable, since the gross weight of a vehicle is not a factor in the design of highways, and, as such, has no relationship to the conservation of the highways, the axle or wheel load of the vehicle being the critical factor.

The District Court found as a fact (Finding of Fact No. 22) that:

> "Gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but wheel or axle weight; that vehicles en-

> gaged in interstate commerce are so designed and the pressure of their weight is so distributed by their wheels and axles that heavy gross loads can be carried over concrete roads without damage to the concrete surface; and that a gross weight limitation of 20,000 pounds is unreasonable as a means of preserving the highway."

This finding was based upon a fundamental truth not questioned at the trial, nor is it seriously attacked in appellees' briefs so far as it applies to the conservation of the highways. Their defense of the regulation in this respect is based upon their claim that it has some relation to the *"maneuverability"* of the front axle (S. C. Br. 67) and to the facility of compliance with and enforcement of the law (S. C. Br. 71) which contentions we hereafter discuss.

While this principle may at one time have been considered "scientific" in the sense that common experience had but *newly* been rationalized and theoretically expressed, it is now a fundamental and universally accepted principle of highway design and regulation.

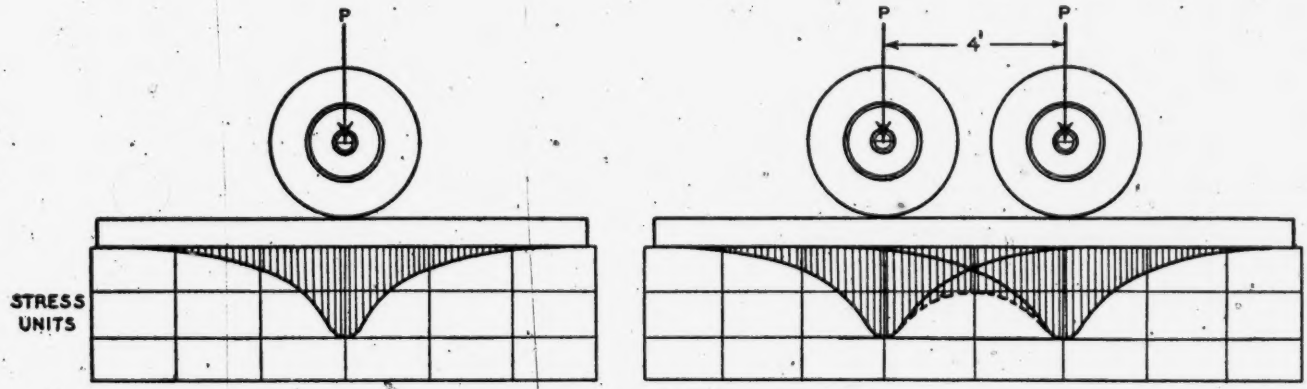
The principle is unequivocally pronounced by the American Association of State Highway Officials, a body of men especially qualified to speak authoritatively: "Highway stresses are ruled by *wheel* loads and not by *gross loads*" and "so far as road surfaces are concerned, the limitation of axle or wheel load gives *full protection,* let gross loads be what they may." (R. 70)

The principle is based upon approved tests which have found that the stress in a concrete pavement caused by the wheel load of a motor vehicle is highly localized and that the critical stress under one wheel is not increased by the presence of the other wheels of the vehicle (provided the axles are more than 40 inches apart (R. 126)), as is illustrated in Figure 1. This is true also for pavements of the macadam type because through inherent lack of slab strength these pavements are unable to distribute the load even as widely as do concrete pavements.

It is true as appellees observe (S. C. Br. 65) that the 20,000 pound gross weight limitation, when translated into axle-loads means that for two-axle trucks there is an automatic limitation imposed on the heavier rear axle varying with the percentage of the load carried on the rear axle. As illustrated in Figure 2, this gross load limitation results in wheel loads of from 8500 to 9000 pounds (17,000 to 18,000 pounds per axle) on conventional four wheel trucks (varying with distribution of load. R. 135; S. C. Br. 67).

This observation but emphasizes the unreasonableness of a law which denies to the operator the benefit of the additional payload which he could carry under these permitted wheel or axle weights by merely shifting the distribution of his load or employing vehicles designed for better load distribution, as illustrated by the first pictured vehicle in Figure 3. Thus this regulation will only serve to discourage the use in interstate commerce of vehicles of proper design, to the only end that the operator's pay load will be disastrously curtailed and the conservation of the highways in no measure advanced. On the other hand, the safety of the highways, which the regulation purports to promote, will be endangered. (Finding of Fact No. 23.)

THE STRESS IN A CONCRETE PAVEMENT CAUSED BY THE WHEEL LOAD OF A MOTOR VEHICLE IS HIGHLY LOCALIZED. THE CRITICAL STRESS UNDER ONE WHEEL IS NOT INCREASED BY THE PRESENCE OF THE OTHER WHEELS OF THE VEHICLE.

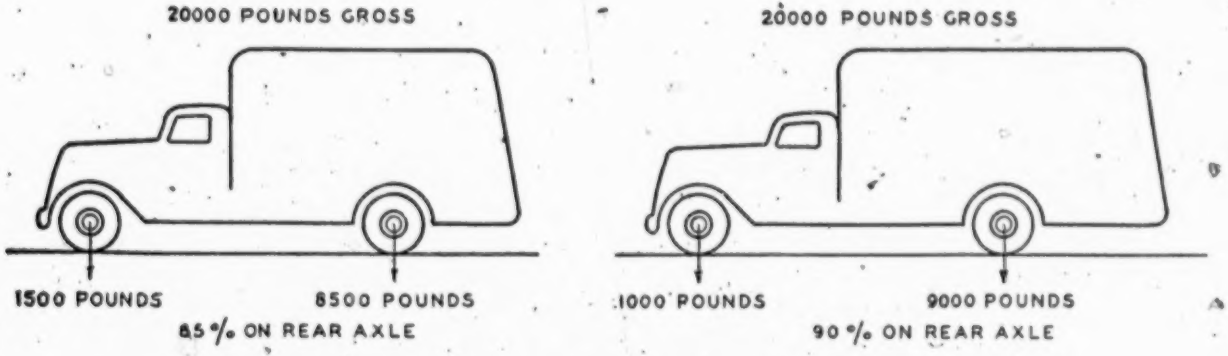


THE WHEEL LOAD AND NOT THE GROSS LOAD IS THE IMPORTANT LOAD SO FAR AS THE CONCRETE PAVEMENT IS CONCERNED. THIS IS TRUE ALSO FOR PAVEMENTS OF THE MACADAM TYPE BECAUSE, WITH THEIR INHERENT LACK OF SLAB STRENGTH THESE PAVEMENTS ARE UNABLE TO DISTRIBUTE THE LOAD EVEN AS WIDELY AS DO CONCRETE PAVEMENTS.

FIGURE 1

IT IS A KNOWN FACT THAT AN APPRECIABLE PERCENTAGE OF TWO AXLE TRUCKS HAVE 85 TO 90 PER CENT OF THEIR TOTAL WEIGHT CARRIED BY THE REAR AXLE.

WITH AN 20000 POUND GROSS LOAD LIMITATION IT IS POSSIBLE TO HAVE CONVENTIONAL 4 WHEEL TRUCKS IMPOSING THE FOLLOWING WHEEL LOADS ON THE ROAD SURFACE.

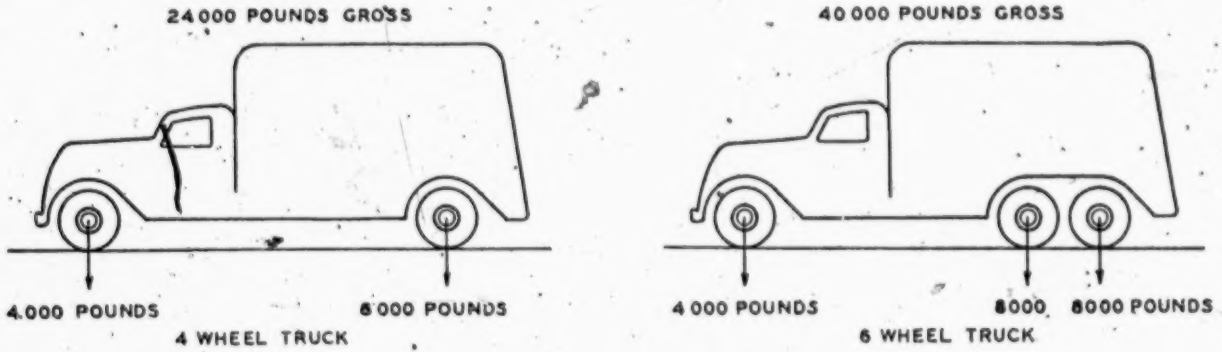


THUS WHEEL LOADS OF THE ORDER OF 8000 POUNDS CAN BE EXPECTED ON THE HIGHWAYS UNDER A SIMPLE 20000 POUND GROSS LOAD LIMITATION.

FIGURE 2

VEHICLES DESIGNED FOR BETTER LOAD DISTRIBUTION CAN, WITH NO GREATER MAXIMUM WHEEL LOADS, CARRY MUCH GREATER PAY LOADS AND STILL DO NO MORE DAMAGE TO THE PAVEMENTS THAN OCCURS UNDER AN 20000 POUND GROSS LOAD LIMITATION.

FOR EXAMPLE:-



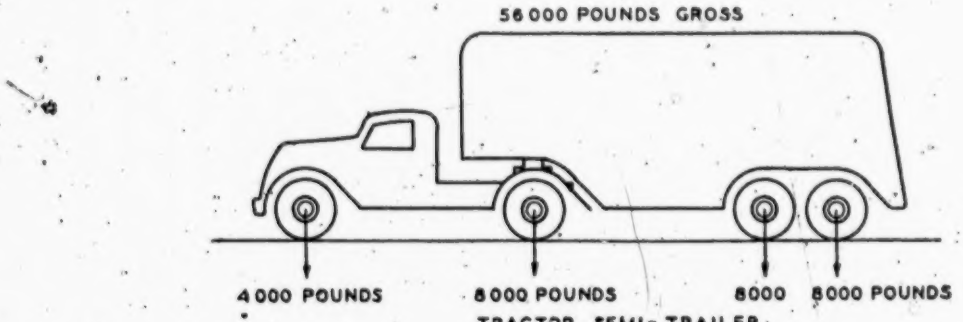


FIGURE 3

These considerations apply in even greater degree to the six-wheel trucks, and to the safest and most efficient vehicle of highway transportation, the tractor semi-trailer.

The 20,000-pound gross load limitation is arbitrary and unreasonable in that it denies to trucks equipped with six or more wheels, and to tractor semi-trailers, the utilization of the increased pay-load capacities resulting from the distribution of the total load over their axles, although the practical axle weights permitted under the 20,000 pound gross load limitation be not exceeded, and the stress upon the highway be not increased.

The extent to which the 20,000 pound gross load limitation exceeds the reasonable necessity for its exercise, discussed above as it is applied to 4-wheel trucks, is even greater when it is applied to 6-wheel trucks and tractor semi-trailers, as illustrated in the second and third pictured vehicles in Figure 3. This conclusion is based upon the same physical principles demonstrated above. While the application of the regulation to 6-wheel trucks reduces gross weight, and hence pay-load, to the extent of 100 per cent (although with no lessening of the highway stress), and thus is of serious concern to motor transportation, it is in its application to the tractor semi-trailer combination that the regulation has its most vicious and unjustifiable effect.

Section 2 of the South Carolina Act provides that for the purpose of gross weight the tractor semi-trailer shall be considered as one unit, although by that same section, for the purpose of licensing, the motor unit and the trailer unit are considered independent units. In its opinion (R. 65, 75) the District Court said:

"Chief among these is the tractor-semi-trailer, in which the power unit is detachable from the load carrying unit, and in connection with the latter imposes no greater strain upon the highway than two trucks of corresponding weight, one following behind the other. Multiplication of axles and wheels distributes the weight of the load, and further protection is obtained from the use of low pressure pneumatic tires. . . . A gross load limit of 20,000 pounds, as we have seen, has no reasonable relation to either safety or preservation of the standard highway, the provision for counting the tractor-semi-trailer combination as one unit for applying the gross load limitation has even less to commend it. . . ."

The burden of the law falls especially heavily upon interstate commerce, because [redacted] commerce is dependent upon the modern tract[redacted]-trailer. As found by the District Court, (Finding of Fact No. 20), "The usual vehicle used by motor transportation companies in interstate commerce is a tractor semi-trailer combination, 96 inches wide and carrying a pay-load of 10 tons or 20,000 pounds." The third pictured vehicle in Figure 3 illustrates that if permitted the axle weights which are permitted four-wheel trucks under the 20,000 pound gross law a tractor-semi-trailer could easily carry the usual interstate pay-load of 20,000 pounds with *less wheel stress upon the highway than that imposed by a four-wheel truck loaded to its gross capacity under the law.*

Yet, as observed by appellees (S. C. Br. 65, 67), while the 20,000 pound gross weight law results in an automatic limitation of from 13,333 pounds to 15,000 pounds for the heavier rear axle of a four-wheel truck, *it results in an automatic limitation of from 8,500 to 9,000 pounds on the second and third axles of a tractor-semi-trailer.*

The law permits highway stresses of 15,000 pounds on an axle of a four-wheel truck, yet confines the axles of a tractor-semi-trailer to 9,000 pounds.

If under the law, a tractor-semi-trailer could weight its axles to the same extent as permitted by the law to a four-wheel truck, it could carry a pay-load *one hundred and sixty per cent greater* than the load it will carry under the 20,000 pound gross limitation, and without increasing the stress on the highway. This is shown by Table II which illustrates the utter dependence of reasonable and practicable pay-loads upon the privilege of distributing the load over the axles of a tractor semi-trailer.

TABLE II.

CAPACITIES OF TRACTOR SEMI-TRAILERS OF VARYING AXLE-LOADS.

(Estimates based upon load distribution of 45% on two rear axles. 12,000 pounds empty weight of combination assumed (R. 114; *Sproles* v. *Binford*, 286 U. S. 374, 389).)

Axle load	Front Axle	Second Axle	Third Axle	Gross Weight	Payload	Per cent increase over payload under law
S. C. law No Regulation	2,000	9,000	9,000	20,000	8,000	
10,000	2,222	10,000	10,000	22,222	10,000	25%
11,000	2,444	11,000	11,000	24,444	12,444	55%
12,000	2,666	12,000	12,000	26,666	14,666	85%
13,000	2,888	13,000	13,000	28,888	16,888	110%
14,000	3,111	14,000	14,000	31,111	19,111	138%
15,000[1]	3,333	15,000	15,000	33,333[2]	21,333	166%
16,000	3,555	16,000	16,000	35,555[2]	23,555	194%
17,000	3,777	17,000	17,000	37,777[2]	25,777	220%
18,000[3]	4,000	18,000	18,000	40,000[2]	28,000	250%

[1] Practical axle weight under 20,000 pounds gross weight regulation (S. C. Br. 65, 67).

[2] With the increase of gross weight beyond 30,000 pounds tractor-semi-trailers of heavier empty weights would be used which would tend to decrease the percentage of increase.

[3] Axle weight with low pressure pneumatic tires recommended by Bureau of Public Roads and American Association of State Highway Officials (R. 70, 275, 280) and adopted by South Carolina Legislature May 12, 1937, but vetoed by the Governor of that State (See Appendix I).

Appellants argue that the imposition of a gross weight restriction is justifiable and reasonable, *notwithstanding it denies to six-wheel trucks and tractor semi-trailers the use of their axles which is allowed the axle of a four-wheel truck, and reduces their pay load capacities over 150 per cent,* because a gross weight law may tend (a) to facilitate steering and "manoeuverability" (S. C. Br. 67) and (b) to facilitate compliance and enforcement (S. C. Br. 71).

Facilitation of Steering and "Manoeuverability."

The argument that a gross weight limitation facilitates steering and manoeuverability of motor vehicles is nowhere referred to in the evidence. No witness either affirmed or disaffirmed it.

We submit that counsel have indulged in theoretical speculation unsupported by the evidence or recognized opinion. This Court said in *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209, that the immunity of the presumption which attaches to legislative action is not "achieved by treating any fanciful conjecture as enough to repel attack." We submit that there is no foundation in the evidence, in facts within the judicial knowledge of the Court, or in common reasoning, for counsels' theory that a motor vehicle with 90 per cent of its gross load on the rear axle is more easily steered or manoeuvered than a vehicle whose load is more equitably balanced. The contrary would seem to be true.

Facility of Compliance and Enforcement.

The contention of Appellants' brief (S. C. Br. 71) that the gross load regulation is reasonable because of the facility of compliance and enforcement is not only based upon inexperienced theorizing by counsel but is

nowhere supported by the evidence. It is in disastrous contrast with the deliberate observations of a body of men who, we can not doubt, are best qualified, by experience and interest alike, to state the truth on the subject. The American Association of State Highway Officials, composed of the enforcement and administrative officials of all the State Highway Departments, answer Appellants' counsel (R. 279):

> "Highway stresses are ruled by wheel loads and not by gross loads. Those who really seek the protection of the highways should help to impress that fact indelibly upon the minds of legislators and law enforcement officers. For, it so happens, that the wheel load is not only the more critical factor but is also the more easily determinable factor. To measure gross loads, stationary platform scales are a practical necessity; and, unless they are placed and actually operated on at least all important roads, the gross load limitation, whatever it may be, will be a virtual deadletter. The wheel load limitation is, on the other hand, easily enforceable by officers, equipped with small, portable scales who, appearing suddenly, first on one road, then on another, may plant their telltale instrument by the roadside and require any driver to run his heaviest wheel on it, and so, quickly and practically, detect the law violators. *And of this at least there can be no question: That for the protection of the roads an enforced wheel load limitation is immeasurably better than an unenforceable gross load limitation.*"

This conclusion was reached, said that body (R. 280) "after many years of consideration on the part of the Highway Transport Committee of the Association, supplemented by painstaking research by a number of State Highway Departments and the Bureau of Public Roads."

That all save five of the States have axle, wheel or tire weight limitations indicates that the recommendations of the Association have been proved by experience.

Like considerations are applicable to the facility of compliance. There is no foundation in the evidence or in experience to support counsels' assumption that operators are unable to comply with axle, wheel or tire weight limitations in the forty three States in which they are effective.

Even if some credence be given counsels' contention that facility of compliance and enforcement would justify a gross weight restriction without regard to axle weights, how does this justify the *same gross weight* for a four wheel truck and for a tractor semi-trailer combination? We have seen above that axles of four wheel trucks will be weighted to 15,000 pounds under the law, but that axles of tractor semi-trailers will be unable to be weighted over 9,000 pounds. If a gross weight limitation is desirable to assure facility of compliance and enforcement, why not fix a gross weight for tractor semi-trailers which would automatically restrict the rear axles to 15,000 pounds? A gross weight of 35,000 pounds would accomplish the purpose. Thus the State of Maryland, while one of the five States with no axle, wheel or tire limitation, fixes a gross weight of 24,000 pounds for a four wheel truck, but 40,000 pounds for a six-wheel truck and tractor-semi-trailers (See Table of States, Section II, Subsection B). The facility of compliance and enforcement claimed by appellants' counsel to flow from a gross load limitation would be preserved, unless perchance, it be contended that the fact that the officer enforcing the law and the operator complying with it would have *only one gross weight figure to remember instead of two* will justify reducing

the pay load capacity of interstate vehicles over 150 per cent. Certainly, if facility of compliance and enforcement can be said to justify a gross load limitation, instead of an axle limitation, the failure of the law to fix a gross weight for tractor semi-trailers higher than that permitted a four-wheel truck is arbitrary and unreasonable.

B. A fortiori because of the physical capacity of the highways and their functional character the regulations arbitrarily and needlessly exceed the reasonable necessity for their exercise.

We have shown in subsection (A) above that irrespective of the physical capacity and functional character of the highways, the weight regulations exceed their reasonable necessity, mainly because of the fact that under them the normal use of the highways will admit axle weighs of 15,000 or more pounds, but this axle capacity will be arbitrarily denied to the safer and more efficient vehicles used in interstate commerce. However, the unreasonableness of these regulations and the extent to which they exceed the reasonable necessity for their exercise is even more strikingly apparent when the physical capacity and functional character of the highways involved are considered.

The contested regulations have never been put into effect. The highways of South Carolina have been safely carrying the intrastate and interstate traffic of the past and present.

It is important to emphasize the fact that the contested regulations have never been put into effect and the highways have been open to the intrastate and interstate traffic of the past and present (R. 209). This is an important consideration: *first,* because the District Court had the benefit of this actual experience and successful behavior of the roads (R. 182) under axle weights of 16,000 and 18,000 pounds and "There is no evidence of deterioration thereof as a result of such traffic except in isolated instances due to unusual conditions" (Finding of Fact No. 21, R. 82) (cf. *Abie State Bank* v. *Bryan,* 282 U. S. 765, 772), and

Second, because it dispels any supposition that interstate commerce has not been unreasonably burdened under the impact of the enforcement of the regulations. Naturally the mere presence of these contested regulations on the statute books has hindered interstate commerce and has tended to discourage investment in modern, efficient transportation units of better weight distribution, and this consideration largely occasioned the original institution of this suit on August 11, 1936; but it was not until November 1, 1936, that the threatened enforcement of the regulations (R. 33) made imperative the grant of an interlocutory injunction by the District Court (R. 37).

In view of the fact that the South Carolina roads are reputedly "as good as any in the country"[1] *and are the best in the Southeastern part of the country,*[2] *we may seriously question the justification for the gross disparity between the South Carolina regulations and those of all the 48 States of the Union (except Alabama,*[3] *Texas,*[3] *Louisiana, Kentucky and Tennessee*[3]*) as shown by the table of States on the opposite page, and their extreme deviation from the considered judgment of those having special knowledge with respect to dealing with size and weight of vehicles using the highways.*

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[1] Testimony of J. S. Williams, Chief Highway Engineer of South Carolina (R. 180).

[2] Idem (R. 184).

[3] As to the enforcement of the restrictive laws of these States, an experienced operator, president of a national association of furniture haulers operating throughout the United States, stated: "The law is not being rigidly enforced in those States . . . . as to paying attention to State laws, it depends on just about like how the railroads operate in various States. That is how rigidly it is enforced."
(R. 147-148)

PRACTICAL WEIGHTS AND WIDTHS OF CONVENTIONAL INTERSTATE MOTOR EQUIPMENT.

Under Axle and Gross Weight Restriction of 48 States.

Note: This table does not purport to give the *exact permissible legal gross weights* for the several types of equipment tabled, which in most cases substantially exceed the figures shown, although in a number of instances the practical and legal limitations coincide. This practicable adjustment of the legal maxima is based upon undisputed data as to the distribution of gross weight over the axles of type of trucks conventionally used in interstate commerce (R. 135; S. C. Br. 67). *The legal width is shown*, since in all save two States the legal and conventional width coincide. In Rhode Island the legal weight exceeds, and under the contested South Carolina regulation it is less than, the conventional width of 96 inches. 1937 amendments to State laws have been considered.

State	Legal Axle Weight in pounds[1]	Practical Gross Weight in Pounds: 4-wheel truck	6-wheel truck[2]	Tractor-Semi-trailer[3]	Gross Wts. Other combinations	Legal Width In inches
Alabama	NR	20,000	20,000	20,000	NP	96
Arizona	18,000	22,000	34,000	40-56,000	90,000	96
Arkansas	15,200[3]	24,000	35,000	40-52,000	66,500	96
California	17,000	26,000	34,000	40-50,000	68,000	96
Colorado	18,000	24,000	34,000	40-50,000	63,000	96
Connecticut	NL 20%[4]	26,000	40,000	40,000	NP	96
Delaware	18,000	26,000	36,000	40,000	62,000	96
Dist. of Col.	24,640	30,800	39,600	39,600	118,000	96
Florida	T 500[1]	22,000	22,000	34,000	NP	96
Georgia	17,600	22,000	39,600	39,600	61,600	96
Idaho	18,000	24,000	40,000	40-60,000	68,000	96
Illinois	16,000	24,000	40,000	40,000	72,000	96
Indiana	16,000	24,000	40,000	40-50,000	Formula[6]	96
Iowa	16,000	24,000	35,000	40,000	Formula[6]	96
Kansas	16,000	24-28,000	34,000	48-56,000	68,000	96
Kentucky	NR	18,000	18,000	18,000	NP	96
Louisiana	NR (Net)	7,000 (Net)	7,000 (Net)	10,000 (Net)	14,000	96
Maine	18,000	24,000	40,000	40,000	40,000	96
Maryland	NR	25,000	40,000	40,000	120,000	96
Massachusetts	T 800[1]	30,000	40,000	40,000	42,000	96
Michigan	18,000[7]	24,000[7]	40,000[7]	45,000[7]	NR	96
Minnesota	18,000	24,000	40,000	40-50,000	NR	96
Mississippi	12,000	22,000	22,000	22,000	30,000	96
Missouri	16,000	24,000	24,000	38,000	48,000	96
Montana	16,800	24,000	34,000	40-50,800	92,000	96
Nebraska	16,000	24,000	32,000	32,000	48,000	96
Nevada	T 600[1]	25,000	38,000	38,000	114,000	96
New Hamp.	15,000	26,000	38,000	38-46,000	69,000	96
New Jersey	Varies[3]	30,000	40,000	60,000	60,000	96
N. Mexico	18,000	24,000	40,000	40-50,000	Formula[8]	96
New York	22,400	36,000	44,000	45-50,000	Formula[6]	96
North Carolina	18,000	20,000	40,000	40,000	40,000	96
North Dakota	16,000	24,000	35,000	35,000	35,000	96
Ohio	18,000	24,000	24,000	42,000	66,000	96
Oklahoma	T 600[1]	24,000	24,000	31,000	55,000	96
Oregon	17,000[9]	24,000	40,000	40-54,000	Formula[6]	96
Pennsylvania	18,000	26,000	36,000	39,000	65,000	96
Rhode Island	22,400	32,000	40,000	40,000	120,000	102
South Carolina	NR	20,000	20,000	20,000	NP	90
South Dakota	16,000	20,000	24,000	30,000	30,000	96
Tennessee	18,000	18,000	18,000	18,000	18,000	96
Texas	T 600[1] (Net)	7,000 (Net)	7,000 (Net)	7,000 (Net)	7,000	96
Utah	18,000	24,000	40,000	40-50,000	Formula[6]	96
Vermont	15,000	25,000[10]	30,000[10]	35,000[10]	35,000[10]	96
Virginia	16,000	24,000	35,000	35,000	35,000	96
Washington	18,500	24,000	34,000	50,000	68,000	96
W. Va.	16,000	24,000	35,000	45,000	Formula[6]	96
Wisconsin	18,000[10]	24,000[10]	36,000[10]	48-55,000[10]	72,000[10]	96
Wyoming	18,000[10]	24,000[10]	40,000[10]	48,000[10]	48,000[10]	96

NR No regulation.
NP Not permitted.

[1] Low pressure pneumatics—Where no axle or wheel weight is prescribed, but weight per inch of tire width is prescribed, latter is shown.
[2] Varies often with number of axles, or distance between outer axles.
[3] Varies with size and number of tires.
[4] Not less than 20% of gross weight.
[6] Varies with distance between outer axles.
[7] Lowered between March 1 and May 31.
[8] 1400 to 17,200 pounds per wheel according to size and number of tires.
[9] 16,000 pounds on unpaved highways.
[10] Varies with system of highway.

In portraying these contrasts, we are not to be understood as urging that this disparity derogates from the power of the State of South Carolina to establish regulations differing from other States and based upon its own necessities. *Cf. Sproles* v. *Binford,* 286 U. S. 374, at page 390. We do believe, however, that this gross disparity in gross weight permitted, amounting approximately to a *100 per cent difference* in all of the 48 States except five, is corroboratory of the District Court's finding that the 20,000 pound gross weight limitation is not required for the safety or conservation of the primary Federal aid highways in South Carolina. Nor do we believe that this disparity can be minimized or described as *"some diversity"* as Appellants attempt to do (Rd. Br. 70) when they quote the Federal Coordinator with reference to uniformity of weight restrictions: "The need of greater uniformity is generally conceded, but the feeling is also quite general that the varying traffic, topographic, and financial conditions in the different States warrant *some diversity* of weight limitations." This disparity is all the more striking when it is considered that the South Carolina limitation of 20,000 pounds gross will apply even to its standard highways which are a part of the national interstate system, while the laws of 43 of the other States of the Nation permit gross weights around *40,000 pounds* not only on their main interstate highways, but on their *local, feeder, and even unimproved highways.*[1]

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[1]As will be seen from the table, the States of Vermont, Wisconsin and Wyoming classify their highways, reducing the gross weights on secondary and rural highways Oregon, allowing 17,000 pounds axle weights on its *paved highways* reduces the axle weight to only 16,000 pounds on *unpaved highways.*

As to the contrast between the South Carolina regulations and the considered opinion of the expert bodies, the District Court said (Opinion, R. 69-71):

> "And as bearing upon the reasonableness of regulations which would thus burden and hamper interstate commerce by truck, and in effect drive much of it from the roads of the state, we must consider the experience of other states and the judgment of those having special knowledge with respect to dealing with size and weight of vehicles using the highways. In this connection we find that the proposed Uniform Act Regulating Traffic on Highways to which we have heretofore referred, published by the Bureau of Roads of the United States Department of Agriculture in 1934, and drafted by the National Conference on Street and Highway Safety in the Department of Commerce, provides a width of 8 feet for motor vehicles, a wheel load of 8,000 and an axle load of 16,000 pounds with high pressure pneumatic tires and a wheel load of 9,000 and an axle load of 18,000 pounds with low pressure tires. The following organizations cooperated in the conference in which this proposed uniform act was drafted, viz.: Bureau of Public Roads, U. S. Department of Agriculture; American Association of Motor Vehicle Administrators; American Automobile Association; American Mutual Alliance; American Railway Association; American Transit Association; Chamber of Commerce of the United States; National Automobile Chamber of Commerce; National Bureau of Casualty and Surety Underwriters; and National Safety Council. Practically the same recommendations with respect to size and weight and identically the same as to the matters here under consideration, were made by the American Association of State Highway Officials in convention at Washington Nov. 17, 1932; and these have been approved by the following groups:

American Automobile Association; American Farm Bureau Federation; American Motorists Association; American Petroleum Institute; Automobile Manufacturers Association; Detroit Board of Commerce; National Association of Motor Bus Operators; National Grange; National Highway Users Conference; National Industrial Traffic League; National Transportation Committee; and Rubber Manufacturers Association.

The American Association of State Highway Officials in its publication 'Who shall use the highways and how', in addition to making the foregoing recommendation as to size and axle weights, says: 'Highway stresses are ruled by *wheel loads* and not by *gross loads'*, and 'so far as road surfaces are concerned, the limitation of axle or wheel loads gives full protection, let gross loads be what they may'. For protection of bridges it recommends that gross weight be fixed by the formula W= (L plus 40), where W represents total gross weight, L the distance in feet between the first and last axles of a vehicle or combination of vehicles, and C a coefficient to be determined by the individual states. For this coefficient a minimum of 700 is recommended. Under this recommendation the minimum gross weight limit could hardly be less than 35,000 pounds."

The force of these recommendations is not detracted from by appellants' citation (S. C. Br. 57) of Section 146 of the Uniform Traffic Code referred to by the District Court. Section 146 reads as follows:

"In view of the varying conditions of traffic, and lack of uniformity in highway construction in the several States, no uniform gross weight limitations are here recommended for general adoption throughout the country. For the protection of bridges, the American Association of State Highway Officials recommends the following formula:

W equals 700 (L plus 40) where W equals the gross weight in pounds and L equals the length in feet between the centers of the first and last axles of a vehicle or combination of vehicles."

But the recommendation of this Section cannot be so interpreted as to render meaningless the axle and wheel weights recommended, as a 20,000 pound gross weight law will do. That 43 of the 48 States have in their gross weight restrictions given practical use and purpose to the recommended axle and wheel weights is proof that the Section has not been construed as appellants would construe it, and this is especially so when it is remembered that gross weights practically double the South Carolina limitations are allowed by the other States not only to their primary systems but to their rural and unimproved roads as well.

The District Court was amply justified in its finding that the main interstate highways of South Carolina were designed to carry and are capable of accommodating, the present interstate traffic, in particular axle weights of 16,000 and 18,000 pounds, and certainly gross weights substantially in excess of 20,000 pounds, without causing abnormal deterioration or impairing the safety of the highways.

The Court had the benefit of the experience of other States, and the considered opinion of expert bodies, including the Bureau of Public Roads, the American Association of State Highway Officials (Opinion, R. 69-71); the testimony of the Chief Highway Engineer of South Carolina that the South Carolina highways

are reputedly "as good as any in the country." (R. 180) and are the best in the Southeastern part of the Country (R. 184).

More significantly it had the benefit of the experience of the past seven years during which the roads of the State had been subjected *without restriction* (R. 209) to interstate and intrastate vehicles of gross weights up to and over 40,000 pounds and axle weights of 16,000 and 18,000 pounds, and this experience proved that, regardless of differences in theoretical estimation, the highways were safely accommodating the traffic.

The District Court had the expert opinion (R. 124-310) of Harry Tucker, professor of Highway Engineering in North Carolina State College, and Director of the Engineering Experimental Station at Raleigh, that pavements of the design used in South Carolina were capable of sustaining axle weights of 16,000 and 18,000 pounds. While he made no detailed study of the highways, he observed several of the main highways over which the interstate and intrastate traffic has been moving *without restriction* for the past seven years, and found no evidence of deterioration or failures caused by such traffic. It was his expert opinion (R. 125) that "if heavy trucks were going to damage the highways and those trucks used those highways for six years," the damage would begin to show up. He observed (R. 130) that the subgrade conditions in South Carolina were excellent, and that there was not as much frost action in South Carolina as in North Carolina (R. 130).

The most competent expert opinion available to the District Court was that of the witness L. W. Teller, (R. 130-136) who had been seventeen years an engineer

with the United States Bureau of Roads, and ten years in charge of research in pavement design. At the trial he was informed of the cross-section design of South Carolina concrete pavements, which information was in accordance with his understanding of those designs (R. 132). He said: "There is not a great range in thicknesses, as used in the states throughout the country. In general, I would say that by far the greatest majority of states have interior slab thicknesses from six to seven inches", and the South Carolina design "is quite a typical design." The witness' considered opinion as to the capacity of the South Carolina paved road type, as described to him, was as follows:

> "There are many factors that effect that relation of the wheel load to the structural behavior of the pavement, but in my opinion the application of a wheel load of the order of 8,000 pounds, through proper pneumatic tire equipment for that wheel load, would not stress the pavement within a half of its breaking strength."

Appellants' counsel go outside of the record to select excerpts from scientific reports and studies made by Mr. Teller and other engineers associated with the Bureau of Public Roads (S. C. Br. 53, 72-78) in their effort to qualify and explain away the witness' deliberate conclusion. Of course, this Court will properly estimate the value of such excerpts, zealously selected, and apart from their context. We think however that these quotations in the appellants' brief but illustrate the value of Mr. Teller's opinion based as it is upon years of research and actual tests by the Bureau of Public Roads under his supervision. That, in reaching his conclusion, the witness took into account all the

varying factors which affect the structural behavior of a pavement is apparent from the above quotation from his testimony. And in this connection the witness stated (R. 134) "My testimony so far as concrete pavements is concerned is opinion based on a very considerable amount of testing data; that is data derived from tests conducted on such type of pavement as we are talking about. My testimony as to what these concrete roads can bear is my opinion based on test data, and I don't believe any other reputable engineer would come to another conclusion from those tests today."

Mr. Teller confined his testimony to concrete roads. Of the 1,134 miles in the seven roads specifically named in the District Court's decree, 68.5 per cent were of this type and quite a considerable more mileage is concrete base with bituminous top (S. C. 92). He pointed out that the concrete pavement is the only pavement that admits "rational design" (R. 134) and that the design of the other types must be based on the observation of pavements of that type under the traffic they are bearing. The evidence disclosed that these other types have been subjected to interstate and intrastate traffic, *without restriction,* for the past seven years, and have not been unduly affected.

Excerpts in appellants' briefs from "Public Roads" regarding effect of "subsoil" conditions on pavement behavior

Appellants' counsel quote extensively from "Public Roads", the publication of the Bureau of Public Roads (S. C. Br. 73-78) to show the relationship between subsoil conditions and pavement behavior. That there is a relationship cannot be doubted, but this is true re-

gardless of the capacity of the highway. These quoted excerpts, unexplained by their authors in the light of the particualr highways and problems here involved, and lifted bodily from their context, can be of little value.

The evidence discloses that the sub-grade conditions in South Carolina were "most excellent" (R. 130), and it is to be assumed that Mr. Teller, who supervised the tests upon which the quoted excerpts were based, had these factors in mind among others when he concluded, as quoted above, that the South Carolina would adequately accommodate wheel loads of 8,000 pounds.

Testimony of J. S. Williamson, Chief Highway Engineer

The Chief Highway Engineer made no attempt to estimate an axle load which he thought should be applicable over all the highways, but it is noteworthy that whenever he spoke of the capacity of the highways he estimated the capacity in terms of *axle loads* not gross loads. His estimates varied from a 12,000 to 13,000 pound axle weight recommendation for the main highways generally (R. 188) to 18,000 pounds per axle for the recently built roads (R. 179) and the "better roads" (R. 189). However, in weighing the significance of the witness' 12-13,000 general recommendation for the primary State highway system, it is highly important to observe that it was a compromise estimate based upon a downward adjustment from the standard 16-18,000 pound axle weight to compensate for weak stretches in some of the highways (R. 182). As the witness put it: "A road is no stronger than its weakest section (R. 182). The evidence disclosed, however,

that on the main interstate highways across the State, and those affected by the decree, there were only a very few weak stretches, and as the District Court said (Opinion, R. 67): "when it has been designed for the accommodation of traffic of the character carried on by the interstate motor carriers, it is unreasonable to withhold the entire system from the use of such traffic because of a few weak links, which if injured by the traffic, can be repaired at comparatively slight expense." This conception of the relation between an improved trunk highway, designed to carry standard traffic of interstate commerce, and a few weak links along its route, is the only conception consistent with the functional character of such a highway, and is recognized as reasonable and proper by all progressive highway officials. Thus, the Chief Highway Engineer of South Carolina (R. 188):

> "Q. So, if there is a failure on the highway, you strengthen that to meet the demands of travel?
>
> A. Yes.
>
> Q. And that is just like any other industry—for instance, if there is a failure of machinery they strengthen or replace it.
>
> A. Yes."

However, no matter to what extent the witness intended his 18,000 pound estimate to apply, his general estimate of an axle load of 12-13,000 pounds is sufficient in itself to indicate that the contested regulations exceed the reasonable necessity for their exercise, since the law will arbitrarily limit the axles of a tractor semi-trailer, the standard vehicle of interstate commerce, to 8,000 and 9,000 pounds (See, page 71). As shown by Table II, page 72, if the tractor semi-trailer

were permitted axle weights of 13,000 pounds, according to the Chief Highway Engineer's general estimate, it could carry *a payload 110 per cent greater* than it will be able to carry under the law, and there is even less justification for this drastic burden when it is considered that under the law, axle weights (on four-wheel trucks) of 17,000 and 18,000 pounds will be stressing the highways as a matter of course (See page 66.)

The Statements of C. H. Moorefield
(R. 255, 261, 265)

The statements of C. H. Moorefield, former Chief Engineer of South Carolina (R. 255, 261, 265), before a committee of the Legislature, which are relied upon in part by appellants to attack the finding of the District Court, must be considered in the light of the fact that they were made in 1931, six years ago; that much of the present primary Federal aid system has been constructed and much of the old improved to meet present conditions of traffic since that time; that he did not have the benefit of the experience of the next six years during which, as shown above, modern traffic of axle weights of 16,000 and 18,000 and gross weights up to 40,000 pounds have been adequately accomodated by the highways; that his recommendations were directed to the highway system as a whole and with no particular reference to the functional character of the primary Federal aid system.

The Testimony of Mr. Clifford Older

It must be conceded that if the extraordinary estimates of appellants' witness, Mr. Clifford Older (R.

231-250) be accepted, the finding of the District Court was not correct. But we must respectfully submit that the District Court was justified in giving no weight whatever to the testimony of this witness. This Court traditionally concedes great weight to the judgment of the lower Federal Courts in passing upon the credibility of witnesses. The interest, frankness, bias, and sincerity of a witness as he testifies on the stand are matters of observation which do not appear of record but which must be taken into account by the trial court in passing upon the credibility of the witness. In the case of Mr. Clifford Older, the District Court had the benefit of these observations. It further appears from the record that Mr. Older's testimony at the trial below was merely one chapter in his history of recent years as a witness on behalf of the railroads in their campaign to lower the motor vehicle weight limits of many States. He had appeared before the North Carolina legislature in 1933, on behalf of the railroads, in an unsuccessful attempt to foster upon that State a law similar to that in South Carolina. He had appeared on behalf of the railroads before legislative committees in Missouri, Kansas, Illinois, and Georgia. He had given a deposition for a similar purpose before a legislative committee in Kentucky (R. 245).

The witness' estimates in this case were radically lower than those of the Chief Highway Engineer of the State (R. 250), although the witness had no actual knowledge as to the experience of the roads, and purported to be based on tests conducted by the witness with varying vehicles weights on different types of roads, which he described at some length in his direct examination (R. 232). However, until his cross-examination (R. 245) "it did not occur" to him to explain to the District Court that these tests were conducted in

1922, 14 years theretofore, before later advances in road design, and with trucks *equipped with solid tires.*

Appellees do not here nor did the District Court in its opinion or findings "contend for" specific axle or wheel weights as intimated by appellants (Rd. Br. 85).

While as shown above the District Court was justified in its finding that the primary Federal aid roads of South Carolina were capable of sustaining without injury wheel loads of 8000 to 9000 pounds or axle loads of 16,000 or 18,000, appellants betray a fundamental misconception of the nature of appellees' complaint and of the District Court's actual decision when they intimate (Rd. Br. 85) that appellees and the District Court "contended" for these axle weights. The District Court had no jurisdiction to determine and fix the reasonable axle weights for the highways, nor did it assume that jurisdiction. It was solely concerned with whether or not the South Carolina regulations exceeded their reasonable necessity, and found that they did so. Even if we accept the 13,000 pound estimate of Mr. Williams, the Chief Highway Engineer (R. 187), which as we have shown above was based upon the witness' theory that the capacity of a cross-state road should be radically adjusted to short weak links, the law even yet far exceeds its reasonable necessity in that it arbitrarily denies such axle weight to the standard vehicle of interstate commerce, the tractor semi-trailer. This deduction was drawn from that witness at the trial (R. 188):

"Q. I show you a drawing here of a particular trailer combination, and as I understand from the

testimony of the engineer, if there is an axle weight of 12,000 pounds on each of the two rear, there would be 6,000 on the front, making a total of 30,000 pounds. Would you think the roads would be sufficiently strong to carry that?

"A. As far as the pavements are concerned, they would get by with 12,000 axle load, just as well as 20,000 gross on two axles with maybe 16,000 pounds. You see that 20,000 pounds gross load, as I understand, you can probably put 80 per cent of that on each axle, which would make a 16,000 pound axle load. As far as the pavements are concerned, that 16,000 pound load would be more stress than the 12,000.

Q. The pavement carries all right the 16,000 pound load?

A. I think some have been going over at more than that."

Thus it appears that while the Chief Highway Engineer recommended an axle weight of 13,000 pounds, short weak links considered, he recognized that under the law the highways would be stressed by axle weights 3,000 pounds in excess thereof.

The evidence of record discloses and the District Court found (Finding of Fact No. 19, R. 82; Oponion, R. 74, 75) that there were only a very few bridges on the main interstate highways in South Carolina which were not designed for and are incapable of carrying or accomodating present traffic and that (Opinion, R. 75) interstate commerce or at least a large part of it could be so routed as to avoid them entirely.

It was not disputed in the trial below that gross weight is a factor in the design and carrying capacity of bridges but that in this respect it is also dependent

upon the length of vehicles. It appears from the evidence that all bridges built with the aid of Federal appropriations have been built according to the plans and specifications of the Bureau of Public Roads and are designed according to the formula $W=C\ (L + 40)$ where W is the gross weight allowed, C is a constant depending on the type of bridge and L is the length of the vehicle, or combinations of vehicles from the front axle to the extreme rear axle, and 40 is a constant (R. 205).

It further appears that even with the smallest used constant of 670 in a normal 30 foot tractor-semi-trailer the gross weight permitted under this formula would be 670 x (30 + 40) or 42,000 pounds (R. 206).

It is apparent from the testimony of the Chief Highway Engineer of the State of South Carolina (R. 192) that only a very few bridges on the main arterial highways used by interstate commerce crossing the State of South Carolina were not designed according to this formula.

Thus the bridges which are now being built or those which have been built during the last several years by the State of South Carolina are designed according to this formula and are capable of carrying these gross weights (R. 190).

Even those bridges in the primary highway system which were not designed according to this formula were designed "for a 10-ton load" (R. 196) which was explained (R. 223-224) to mean that a tractor semi-trailer weighing 35,000 pounds could safely operate on such bridges because to design a "10-ton bridge" is to design it for a series of 10-ton vehicles going in both directions on the bridge one behind the other for the whole length and that (R. 224) the effect of a tractor-semi-trailer weighing 40,000 pounds would be equiva-

lent to two single trucks following each other weighing 20,000 pounds each.

The Court further found (Opinion, R. 75) that the location of the one or two bridges not designed for 10 ton loading or under construction and even the bridges designed for as low as 10 tons were so located that interstate commerce could be easily routed so as to avoid them entirely.

Of great significance is the fact that for the past seven years interstate traffic by trucks and tractor-semi-trailers ranging up to 40,000 pounds gross weight have been safely traversing all the bridges on the roads in the primary interstate system (R. 209, 192); that the weaker bridges have been constantly improved and strengthened to meet the needs of traffic (R. 185) and that four-wheel buses freighted with human beings of weights in excess of the gross limitation of the South Carolina law have for the past seven years been continuously and safely using the bridges of the highway system (R. 186) and that the State Highway Department has not felt it necessary to warn against the use of these bridge by these busses.

In view of this evidence we feel that the District Court was amply justified in finding (Opinion, R. 74-75, Finding of Fact No. 19, R. 82) that it would be beyond the reasonable necessities of the State of South Carolina to deny entirely the use of the primary interstate system because of a few questionable bridges so located that interstate commerce could be so routed as to avoid them altogether.

As to the capacity of the bridges of the entire highway system of South Carolina it is interesting to observe that by the Act enacted by the General Assembly in May 1937 and vetoed by the Governor (see Appendix 1) gross weights were to be permitted according to

the formula approved by the Bureau of Public Roads and recommended by the American Association of State Highway Officials, that is, $W = 700 \times L + 40$, which in the case of tractor-semi-trailers would permit a gross weight of 45,000 pounds otherwise applicable under the Act.

The South Carolina Regulations exceed the reasonable necessity for their exercise in that they fail to recognize and respect the functional character of the primary interstate highway system.

Appellants contend (S. C. Br. 75-106) that "The State in order to protect 57,000 miles of highway, 96 per cent of all public roads in the State, had an absolute right to make its limitations apply to and include traffic over the remaining 4 per cent. It was authorized to include within its scope all the roads in the two segments *regardless of their capacity* as a means of insuring effective enforcement."

Because we believe that the question raised by this argument is fundamental to a proper conception and determination of this case we will quote from the appellants' brief (S. C. Br. 95) a different expression of this same argument:

> "That in enacting and administering regulations pertaining to the use of public highways a State may treat all of its roads and streets as a whole, and that in testing this reasonableness of legislative action in such cases the entire highway system, as a single entity, must be considered, *and that the fact that such limitations might be unreasonable as applied to a limited portion of the total mileage* (which we do not concede in this case) is not enough to justify the conclusion that the stat-

ute is unreasonable and, hence, invalid, either in its application to all of the roads or in its application to a limited portion of the same."

This theory, by which it is sought to justify the unreasonableness of the South Carolina regulations as they will apply to the primary Federal aid system, finds interesting contrast in the policy of 43 of the 48 States of the Union by which these States seek, not to drag down their primary systems to the level of their rural systems and thus defeat their normal functions, but rather to give expression to these functions by leaving their primary systems open to their normal capacities and integrating with their secondary and rural systems. This is apparent from the fact heretofore noted, that these States apply weight limitations governed by the normal physical capacities of their primary systems not only to these systems but to their secondary and rural roads as well. Again we desire to make it clear that in portraying the contrast between the policies of these 43 States and that of South Carolina expressed in the contested regulations we do not attempt to derogate from the power of the State of South Carolina to establish regulations differing from other states and based upon its own necessities. Cf. *Sproles* v. *Binford,* 286 U. S. 374, at page 390.

We do not contend that a State must establish separate weight limitations for its Federal aid system and its rural and unimproved systems; but we do assert that a State may not render ineffective the entire cooperative undertaking between the National Government and the States in the development and maintenance of an interconnected interstate system adequate for the commerce of the Nation, by dragging that portion of this National system within its borders down to

the level of its rural and unimproved highways, merely that certain conjectural administrative difficulties might be avoided.

To what end the national investment and co-operative undertaking to achieve "completion of an adequate and connected system of highways, interstate in character", if the administrative problems naturally heir thereto are to justify a complete denial of its intended functions? To what purpose the improvement of any system of highways if the administrative difficulties incident to its improvement is to justify the frustration of its intended purpose by legislative restrictions to relieve that difficulty?

As shown in Subsection B of Section I of this brief, *and as found by the District Court,* the enforcement of the South Carolina regulations will result in defeating the purposes for which the National Government and the States have completed the improved and capable primary Federal aid system. Appellants argue that this result is justified in order that the State of South Carolina might avoid possible administrative difficulties incident to the completion of that portion of this National system within its borders. By way of analogy they cite *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, and other cases, to the effect, that (as appellants paraphrase (S. C. Br. 103):

> "In order to make a statute workable and enforceable the legislature may, in creating a classification, lay down a broad, general, easily enforceable description of a class, and if the classification is otherwise valid, the fact that some 'innocent objects' are included in the class in order to 'insure a reasonable margin for effective enforcement' the statute is nevertheless valid in its entirety."

There is no evidence in the record that there exists any administrative difficulty which makes advisable a uniform limitation for all roads, but even if such exists, we cannot believe that the reasonable necessities of the State in that regard are such as to justify treatment of the primary Federal aid system of South Carolina as an "innocent object" which may be sacrificed on the altar of administration. The entire Federal aid program would be jeopardized by such a pernicious doctrine. In *Morris* v. *Duby,* 274 U. S. 135, 145, this Court said:

> "Regulation as to the method of use . . . remains with the States . . . unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contributions to bettering the highway systems of the Union . . ."

However, appellants' counsel go beyond the record to erect facility of administration as a justification for the defeat of Federal aid and are again open to the reminder of this Court in *Borden's Farm Products Co.* v. *Baldwin,* 293 U. S. 194, 209, that the immunity of the presumption which attaches to legislative action is not "achieved by treating any fanciful conjecture as enough to repel attack."

The 90-Inch Width Limitation is Beyond Its Reasonable Necessity.

We have seen under Subsection B, Section I of this brief that the enforcement of the 90-inch width limitation of the South Carolina Act will create a wall around the borders of that State which will absolutely bar 85 to 90 per cent of all motor vehicles now being used in interstate commerce, since these instrumentalities of commerce have been designed with a width limit of 96

inches to conform to the permissible width limits of all the remaining 47 states. Yet the physical characteristics of the Federal aid highways in South Carolina do not reasonably require such a drastic effect upon interstate commerce.

The reason for the national uniformity in the adoption of a 96-inch width limitation is found in Section 9 of the Federal Highway Act of 1921, which provided:

> "That *all highways in the primary or interstate system* constructed after the passage of this Act shall have a right of way of ample width and a wearing surface of an adequate width which *shall not be less than eighteen feet*, unless, in the opinion of the Secretary of Agriculture, it is rendered impracticable by physical conditions, excessive costs, probable traffic requirements, or legal obstacle."

The standard 96-inch width limitation has the support and recommendation of the American Association of State Highway Officials (R. 280) and is the vehicle width for which the primary Federal aid system has been designed in accordance with Section 9 of the Federal Highway Act of 1921, as indicated by the fact that the Bureau of Public Roads has long recommended it to all the States (R. 280).

The main interstate highways of South Carolina have been constructed according to the mandate of Section 9 of the Federal Highway Act of 1921. The evidence (R. 177) disclosed that most of the concrete paving of the State is eighteen feet wide, some twenty feet, and some (around 100 miles only, R. 197) sixteen feet wide.

The Chief Highway Engineer of the State testified (R. 177):

> "Q. Now will you give us the width of the road?
> A. Most of our pavements are eighteen feet in width. We have some twenty feet and some sixteen feet. There is one little stretch in Sumter

County that is only nine feet wide. That is a concrete pavement. No in bituminous surface our roads are twenty feet and wider. The standard is twenty feet and we sometimes widen where adjacent and close to towns or through different communities. The standard is twenty feet.

Q. How about dirt roads?

A. We surface them about twenty feet."

Of the 6100 miles in the State Highway System 2417 was standard pavement, 1724 bituminous surface, 1141 earth type, and unimproved 666 miles (R. 159).

Of this total of 6100 miles, approximately 2317 miles (2417 miles of pavement less about 100 miles of 16 foot width) had a width of 18 to 20 feet; 1724 miles (bituminous surface) had a width of 20 or more feet; and 1141 miles (earth type) a width of about 20 feet. Thus in the State Highway System there are approximately 5182 miles of highway built to the width required by Section 9 of the Federal Highway Act, and only about 100 miles of 4141 miles of surfaced highway was less than 18 feet wide.

We submit that in the light of these facts the District Court was justified in saying (Opinion, R. 67):

> "So far as the width of the trucks is concerned, it appears that 96 inches is the standard width of the trucks now used in long distance hauling and engaged in interstate commerce, that 85 per cent of the trucks manufactured for long distance hauling are of that width, and that South Carolina is the only state in the Union which limits the width of trucks using its roads to 90 inches. As this limitation would bar from the roads many of the trucks engaged in interstate commerce, and as the standard pavement roads, with the exception of about 100 miles, are 18 to 20 feet in width and furnish ample space for the safe operation of such standard width trucks, the limitation seems clearly an unreasonable one to apply to these roads."

III.

THE APPLICABLE CONSTITUTIONAL PRINCIPLE.

In Section I of this brief we have shown that the enforcement of the South Carolina regulations will inflict a drastic burden on interstate commerce, amounting to practical prohibition. In Section II this burden was shown to be needlessly inflicted because these regulations exceed the reasonable necessity for their exercise. In Section III we will argue (A) that State police legislation inflicting a substantial burden on interstate commerce, and transcending the reasonable necessity for its exercise, is void under the Commerce Clause, (B) that this accepted constitutional principle is also applicable to State legislation limiting the size and weight of motor vehicles engaged in interstate commerce, and (C) that measured by this principle, under the evidence in this case, the South Carolina regulations are void.

A. The Constitutional Principle Involved:

> "An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them. In the absence of national legislation especially covering the subject of interstate commerce, the State may rightly prescribe uniform regulations adopted to promote safety upon its highways and the conservation of their use, applicable alike to vehicles moving in interstate commerce and those of its own citizens."
>
> *Morris* v. *Duby*, 274 U. S. 135, 143 (1927);
> *Sproles* v. *Binford*, 286 U. S. 374, 389 (1932);
> Opinion of Court below, Record, page 71.

This statement of the law is an agreed premise on this appeal. No contention is here made that congressional action, either by the Federal Highway Acts or Part II of the Interstate Commerce Act (Motor Carrier Act, 1935) has superseded the power of the states as defined.

The regulations of the South Carolina statute by their terms apply indiscriminately to carriers engaged in interstate and intrastate commerce.

No assault has been made upon the statute as violative of the equal protection clause of the Fourteenth Amendment in exempting passenger carriers from its terms, nor as violative of the contract clause of the Constitution in denying motor carriers the power to fulfill existing contracts of carriage.

As to these matters, adversary briefs indulge in much unnecessary debate in which there is no need for us to join.

The only question presented for the consideration of this Court is whether the regulations of the South Carolina statute are a proper exercise of admitted police power under the Due Process clause of the Fourteenth Amendment and the Commerce Clause.

Appellants assert that since the lower court found that the regulations (1) have not been superseded by federal legislation, (2) apply indiscriminately to interstate and intrastate commerce, and (3) are consistent with the Fourteenth Amendment, there is no other test to apply and the regulations are valid *regardless of the effect of their enforcement upon interstate commerce.*

Appellees deny that the regulations are valid under the Due Process Clause. The finding of the lower court to that effect was superfluous and unnecessary to its decision. In maintaining this position here we do not

attack the decree of the lower court, but sustain it, and hence under established law we need no cross-appeal.

But the test of validity applied by the lower court was correct, and is properly applicable regardless of the test under the Due Process Clause. A finding by this Court as to the Fourteenth Amendment is unnecessary in this appeal. We shall address our argument to the constitutional propriety of the test by which the lower court held the regulations unconstitutional.

The variance between appellants' and appellees' theories of the principle involved may be contrasted as follows:

A state police regulation, in the absence of federal legislation, affecting a subject which admits of diversity of treatment according to the special requirements of local conditions, and applying indiscriminately to interstate and intrastate commerce, but substantially burdening and seriously interfering with interstate commerce—

Appellees:	Appellants:
. . . is invalid if the regulation exceeds the reasonable necessity for the exercise of the police power.	. . . is valid, regardless of the effect upon interstate commerce, if it can be seen that in any degree, or under any reasonably conceivable circumstances, there is an actual relation between the means and the end.[1]

[1] "It is clear that it is established law that the consequent effect upon interstate commerce of the exercise of a State's police power is entirely immaterial." S. C. Br. p. 119; cf. Ky. Br. p. 24; Rd. Br. p. 45.

The distinction is not merely one of words—it has definite legal substance, and has often been applied in the decisions of this Court.

Under appellees' theory, the States may not cavalierly and unnecessarily ignore the needs of interstate commerce.

Under appellants' theory, the States may not only needlessly ignore, but may *with deliberate motive* ignore, the needs of interstate commerce.

How, under appellants' conception of the constitutional adjustment between State and National interests, can be reconciled the decision of this Court in *Seaboard Air Line Ry.* v. *Blackwell,* 244 U. S. 310 (1917), in which the issue was squarely presented, but which is conspicuously truant from the indices of adversary briefs?

This decision had its prologue in the case of *Southern Ry. Co.* v. *King,* 217 U. S. 524 (1910), in which this Court affirmed judgments of the lower federal courts sustaining a demurrer to the answer filed by the railroad in an action for personal injuries at a crossing. The negligence charged to the railroad was violation of Section 2222 of the Civil Code of Georgia, which read as follows:

> "There must be fixed on the line of said road, and at the distance of 400 yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof so as to stop in time should any person or thing be crossing said track on said road."

The railroad in its amended answer made the general averment, not supplemented by factual allegations, that the statute was an unreasonable burden on interstate commerce, and introduced evidence tending to show the burden of the statute.

This Court ruled that this pleading was defective and that in the absence of an averment of facts setting up a situation showing the unreasonable character of the statute as applied to the railroad under the circumstances, the amended answer set up no legal defense, and that the railroad's evidence was properly excluded.

However, in the course of its opinion, this Court, after observing that "the rights of the states to pass laws not having the effect to regulate or directly interfere with the operations of interstate commerce, passed in the exercise of the police power of the state in the interest of the public health and safety," were to be upheld, and after reviewing decisions upholding and decisions invalidating such laws, said (at page 533):

> "Applying the general rule to be deduced from these cases to such regulations as are under consideration here, *it is evident that the constitutionality of such statutes will depend upon their effect upon interstate commerce.* It is consistent with the former decisions of this court and with a proper interpretation of constitutional rights, at least in the absence of Congressional action upon the same subject-matter, for the State to regulate the manner in which interstate trains shall approach dangerous crossings, the signals which shall be given, and the control of the train which shall be required under such circumstances. Crossings may be so situated in reference to cuts or curves as to render them highly dangerous to those using the public highways. They may be in or near towns or cities, so that to approach them at a high rate of speed would be attended with great danger to life or limb.

> On the other hand, highway crossings may be so numerous and so near together that to require interstate trains to slacken speed indiscriminately at all such crossings would be practically destructive of the successful operation of such passenger trains. Statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation, *but also a direct burden upon interstate commerce,* and therefore beyond the power of the State to enact."

Mr. Justice Holmes wrote a dissent, concurred in by Mr. Justice White, which concluded (at page 539):

> "It seems to me a miscarriage of justice to sustain liability under a statute which possibly, and I think probably, is unconstitutional, until the facts have been heard which the petitioner alleged and offered to prove. I think that the judgment should be reversed."

Seven years later, in *Seaboard Air Line Ry.* v. *Blackwell,* 244 U. S. 310, this Court was again asked to review the validity of this same statute under the Commerce Clause. Again the inferior court (this time the Supreme Court of Georgia) had sustained a demurrer to the answer of a railroad in an action for personal injury at a crossing.

But this railroad defendant's answer was not defective as a pleading. It alleged that between the city of Atlanta, Georgia, and the Savannah River, where the same is the boundary line of Georgia, a distance of 123 miles, there were 124 points where the line of the railroad crossed public roads of the different counties of the State, established pursuant to law, and that all such crossings were at grade; that if the law were complied with the running time between these points would have been more than doubled; that the crossings were the

usual and ordinary grade crossings and there were no conditions which made any one of them peculiarly dangerous other than such danger as might result from the crossing of a public road by a railroad track at grade.

This Court[1] by Mr. Justice McKenna said (at page 315)

> "... We need not descant upon the extent of the police power of the state and the limitations upon it when it encounters the powers conferred upon the National Government. There is pertinent exposition of these in Southern Railway Co. v. King, 217 U. S. 524. The case is clear as to the relation of the powers and that the power of the State cannot be exercised to directly burden interstate commerce .... the facts (page 316) which it was decided would give illegal operation to the statute are alleged in the present case, and assuming them to be true—and we must so assume—compel the conclusion that the statute is a direct burden on interstate commerce, and, being such, is unlawful."

From the decision, Chief Justice White, Mr. Justice Pitney, and Mr. Justice Brandeis dissented (page 316) "on the ground that the regulation in question was within the class which the State is entitled to enact in the absence of congressional action, and until such action. There having been no action by Congress, there is therefore no ground for holding the state action void as a regulation of interstate commerce."

Thus, as emphasized by the grounds of this dissent, a majority of the court reached the deliberate conclusion that the effect upon interstate commerce of a State

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[1] Five Justices were now sitting who had ascended the Bench since the prior decision, two of whom were Mr. Justice Brandeis and Mr. Justice McReynolds of the present Court.

statute, even though applying indiscriminately to intrastate and interstate commerce, and admittedly enacted in the exercise of a proper power of police, was a relevant and pertinent factor in determining its validity under the Commerce Clause, and that where such a statute, by its choice of method or extent of application, goes beyond the reasonable necessities for its exercise, and inflicts a drastic burden on interstate commerce, it must be held void.

Conceivably, tested under the Fourteenth Amendment by one engaged solely in intrastate commerce, the statute should have been upheld, but this consideration only serves to indicate that the protection of the Commerce Clause has a quality and importance, justified by the purposes and political necessities of that clause of the Constitution, distinct from the protection afforded by the Fourteenth Amendment.

The principle of constitutional law applied in *Seaboard Air Line Ry.* v. *Blackwell, supra,* finds expression in many dicta of this Court throughout its history, and it has been decisively applied in many cases involving varying factual situations. In truth, the presence in our constitutional phraseology of the expression "burden on interstate commerce" is implicit recognition that the principle has its place in the framework of the law, given a proper case for its application. Such a phrase is utterly superfluous in a constitutional system which as appellants would contend, invalidates a State police statute, under the Commerce Clause, only when (1) it has been superseded by Congressional action, either expressly or by necessary effect; (2) it regulates or substantially affects a subject demanding national uniformity of regulation even in the absence of federal action; (3) it regulates a subject matter admit-

ting of a diversity of treatment, according to the special requirements of local conditions, but discriminates against interstate commerce; (4) it violates the Fourteenth Amendment (in which event, obviously, it is not invalid because of the Commerce Clause). The labels, "supersedure," "direct regulation of interstate commerce," "discrimination," and "lack of due process" have been applied to such cases.

To these criteria of validity under the Commerce Clause, however, must be added another, if many decisions of this Court are not to be thrown into discard, and if the concept of an "unreasonable or unnecessary burden on interstate commerce" is to be preserved in order to make effective the "practical adjustment by which the natural authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency" (*The Minnesota Rate Cases, Simpson* v. *Shepard,* 230 U. S. 352, 402).

This is that a State statute, though admittedly of a class valid as the exercise of police power, enacted in the absence of federal regulation, and applying indiscriminately to interstate and intrastate commerce, affecting commerce only by regulating a subject matter admitting of a diversity of treatment, according to the special requirements of local conditions, *may nevertheless be invalid under the Commerce Clause,* if it causes a drastic interference with interstate commerce and serious prejudice to the national interests *not required by the reasonable necessities for the exercise of the power.*

This criterion has been that by which this Court has many times tested State quarantine laws, in the absence of federal legislation—laws of a class conceded to require diverse and local treatment. A quarantine

law, by its very nature, even as a law limiting the size and weight of motor vehicles, necessarily affects interstate commerce in a substantial degree. Some have been upheld, and some invalidated. We submit that the test has been the criterion above stated—that, because of its drastic effect on interstate commerce, the state law must not go beyond the reasonable necessity for its exercise, and if it does, is to that extent void.

This principle was aptly stated by Mr. Justice Strong in *Hannibal & St. J. Railroad Co.* v. *Husen,* 95 U. S. 465, at pages 472-74:

> "While we unhesitatingly admit that a State may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the State; while for the purpose of self-protection it may establish quarantine, and reasonable inspection laws, it may not interfere with transportation into or through the State, beyond *what is absolutely necessary for its self-protection.* . . . ."
>
> "In coming to such a conclusion, we have not overlooked the decisions of very respectable courts in Illinois, where statutes similar to the one we have before us have been sustained. *Yeazel* v. *Alexander,* 58 Ill. 254. Regarding the statutes as mere police regulations, intended to protect domestic cattle against infectious disease, those courts have refused to inquire whether the prohibition *did not extend beyond the danger to be apprehended, and whether, therefore, the statutes were not something more than exertions of police power.* That inquiry, they have said, was for the legislature and not for the courts. With this we cannot concur. The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and *under*

color of it objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

In *Cleveland, etc. Ry. Co.* v. *Illinois* (1900), 177 U. S. 514, we find the court making the same approach to the problem (at page 516):

"Few classes of cases have become more common of recent years than those wherein the police power of the State over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employes, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good." (After citing cases upholding legislation of this general class) . . . "In none of these cases was it thought that the regulations *were unreasonable* or operated in any just sense as a restriction upon interstate commerce.

"But for the reason that these laws (citing cases) were considered unreasonable *and to unnecessarily hamper commerce between the states,* we have felt ourselves constrained in a large number of cases to express our disapproval . . .

"Several acts *in pari materia* with the one under consideration have been before this court, and have been approved or disapproved as they have seemed *reasonable* or *unreasonable,* or bore more or less heavily upon the power of railways to regulate

> their trains in the respective and sometimes conflicting interests of local and through traffic. * * * We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very spirited, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their coaches or sleeping berths or the excellence of their tables would insure them such share, if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The public demand this; the railway and steamship companies are anxious in their own interests to furnish it, and local legislation ought not to stand in the way of it."

In *Houston & Texas Central Railroad Co.* v. *Mayes*, 201 U. S. 321; the Court considered the validity under the Commerce Clause of a Texas statute regulating railroad car service. The following language was used:

> "The exact limit of lawful legislation upon this subject cannot in the nature of things be defined. It can only be illustrated from decided cases, by applying the principles therein enunciated, determing from these whether in the particular case the rule be reasonable or otherwise. * * *
>
> "Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the State, and may have been intended merely to secure promptness on the part of the railroad companies, in providing facilities for the speedy transportation, we think that in its practical operation it is likely to work a great in-

justice to the roads, and to impose heavy penalties for trivial, unintentional and accidental violations of its provisions, when no damages could actually have resulted to the shippers. * * *

"Although it may be admitted that the statute is not far from the line of proper police regulation, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the legislature."

That the State in the exercise of its police power should not exceed the reasonable necessities for its exercise to the detriment of interstate commerce is clearly stated in *Mississippi R. R. Comm.* v. *Illinois Cent. R. R.*, 203 U. S. 335 (1906) at page 346:

"The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between States, both of passengers and freight. *A wholly unnecessary, even though a small, obstacle ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals.* We by no means intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the State through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and after the wants of the residents within a state or locality through which the road passes have been adequately supplied, regard being had to all

> the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability of the road to successfully compete with its rivals in the transportation of interstate passengers and freight."

In upholding a statute of Kentucky in *South Covington etc. Ry. Co.* v. *Kentucky,* 252 U. S. 399, at page 404, Mr. Justice McKenna said:

> "The regulation of the act affects interstate commerce incidentally *and does not subject it to unreasonable demands.*"

This Court in the *Minnesota Rate Cases,* 230 U. S. 351, at page 401, said:

> "The states cannot . . . subject the operations of carriers in the course of such (interstate) transportation to requirements that are unreasonable *or pass beyond the bounds of suitable local protection.*"

In *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio,* 173 U. S. 285, at pages 300 and 301, while upholding a state law as reasonable, this Court said:

> "In what has been said we have assumed that the statute is not in itself unreasonable; that is, it has appropriate relation to the public convenience, *does not go beyond the necessities of the case,* and is not directed against interstate commerce. In *Railroad Co.* v. *Husen,* 95 U. S. 465, 473, reference was made to some decisions of state courts in relation to statutes prohibiting the introduction into a State of cattle having infectious diseases, and in which it was contended that it was for the legislature and not for the courts to determine whether such legislation went beyond the danger to be apprehended and was therefore something more than

the exertion of the police power. This court said that it could not concur in that view; that as the police power of a State cannot obstruct either foreign or interstate commerce 'beyond the necessity for its exercise,' it was the duty of the courts to guard vigilantly against 'needless intrusion' upon the field committed by the Constitution to Congress. *As the cases above cited show, and as appears from other cases, the reasonableness or unreasonableness of a state enactment is always an element in the general inquiry by the court whether such legislation encroaches upon national authority, or is to be deemed a legitimate exertion of the power of the State to protect the public interests or promote the public convenience.*"

We are not to be understood as attempting to exalt as precedents the dicta above quoted, nor the decisions of this court in the cases above discussed, nor do we offer them as precise analogies by which the instant case should be decided under the rule of *stare decisis*. We do submit, however, that they demonstrate conclusively that under our constitutional system there is a test of the validity of State police power substantially effecting interstate commerce, not limited to the test of the Fourteenth Amendment.

The decisions of this Court in *N. Y. N. H. & H. R. Co.* v. *New York*, 165 U. S. 628, and in *Erie Railroad Co.* v. *Board of Public Commrs.*, 254 U. S. 394, are cited by appellants in support of their theory that in the absence of Federal legislation a State police regulation, not discriminatory against interstate commerce and consistent with the Fourteenth Amendment, is valid *whatever its effect* upon interstate commerce, and may exceed the reasonable necessity for its exercise even to the extent of prohibiting that commerce. (S. C. Br. pp. 115-119.)

(*Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422 and *Sitz* v. *Hesterberg,* 211 U. S. 31, involving state police power invoked to *preserve State property* and *Morris* v. *Duby,* 274 U. S. 135 and *Sproles* v. *Binford,* 286 U. S. 374, involving State police power to limit the size and weight of motor vehicles, are also cited by appellants to support this principle. These cases are distinguished under subsection (C) of this Section.)

The decision of this Court in *N. Y. N. H. & H. R. Co.* v. *New York, supra,* upholding a statute of the State of New York requiring trains to be heated in a certain way is not precedent to the effect that a State may transcend its reasonable necessities to inflict a drastic burden on interstate commerce. Obviously, in the absence of Federal legislation some control of heating arrangements was necessary for the protection of the public. *There was no allegation, contention, proof or finding that these regulations transcended the reasonable necessities of the State of New York.* Under the principle which we contend is applicable the absence of this finding makes it unnecessary to consider the resultant effect upon interstate commerce. However, in the New York case *there was no proof or finding as to the effect of the enforcement of the law upon interstate commerce.* The only consideration in that respect called to the attention of the Court was the *suggestion* of counsel (on page 632) that a burden might result. The dictum of the Court quoted by appellants was with regard to "these possible inconveniences (page 632)". The case of *Seaboard Air Line Ry.* v. *Blackwell,* 244 U. S. 310, involved a police statute of a similar type. Again some regulation was necessary for the protection of the public, but in this case the measures adopted by the State exceeded their necessity and

created a serious burden on interstate commerce. This Court held it void under the Commerce Clause.

Similar considerations distinguish the second case, *Erie RR. Co.* v. *Public Utility Commrs.*, 254 U. S. 394, upholding a commission order directing a railroad to pay the expense of eliminating a crossing. In the first place, it is to be noted that Mr. Chief Justice White, Mr. Justice Van Devanter and Mr. Justice McReynolds dissented from that decision. The majority of the Court found, in effect, that the order of the Commission and the statute upon which it was based did not exceed the reasonable necessities of the State, and there was no finding of a burden on interstate commerce, other than a financial burden imposed upon a single company arising out of its own financial condition.

This Court later made it clear that it did not intend to hold by that decision that a State might exceed the reasonable necessities for the exercise of the police power when to do so would result in the destruction of a private business or a burden on interstate commerce. In *Lehigh Valley R. R.* v. *Commissioners*, 278 U. S. 24, 34 (1928) this Court said:

> "This Court has said that where railroad companies occupy lands in the State for use in commerce, the State has a constitutional right to insist that a highway crossing shall not be dangerous to the public, and that where reasonable safety of the public requires abolition of grade crossings, the railroad can not prevent the exercise of the police power to this end by the excuse that such change would interfere with interstate commerce or lead to the bankruptcy of the railroad. *Erie R. R.* v. *Board*, 254 U. S. 394. This is not to be construed as meaning that danger to the public will justify great expenditures unreasonably burdening the railroad, when less expenditure can rea-

sonably accomplish the object of the improvements and avoid the danger. If the danger is clear, reasonable care must be taken to eliminate it and the police power may be exerted to that end. But it becomes the duty of the Court, where the cost is questioned, to determine whether it is within reasonable limits."

And by the time of the decision of this Court in *Nashville, C. & St. L. Ry.* v. *Walters* (1935), 294 U. S. 405, it had become apparent that this particular exercise of the police power must be conditioned among other things by the functional character of the highway involved.

B. This Constitutional Principle Applicable to State Police Power Generally is Also Applicable to State Legislation Limiting the Size and Weight of Motor Vehicles as it Affects Interstate Transportation Over the National System of Interstate Highways.

Appellants contend that because the highways remain the public property of the States they do not fall within the protection of the Commerce Clause against restrictions on interstate commerce which exceed the reasonable necessities of the State. They cite *Geer* v. *Connecticut,* 161 U. S. 519, *Sitz.* v. *Hesterberg,* 211 U. S. 31, and *Bayside Fish Flour Co.* v. *Gentry,* 297 U. S. 422, as holding that in the preservation of its own property State legislation is in no wise affected by the limitations of the Commerce Clause but the decisions of this Court in *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U. S. 229, *Pennsylvania* v. *West Virginia,* 262 U. S. 553, and *Foster-Fountain Packing Co.* v. *Haydel,* 278 U. S. 1, make it clear that this Court has repudiated the argument

that a State in regulating the use of its own property is not regulating interstate commerce where its regulation affects persons engaged therein.

In the two cases in which this Court has considered the validity under the Commerce Clause of State statutes regulating size and weight of motor vehicles, *Morris* v. *Duby,* 274 U. S. 135 (1927), and *Sproles* v. *Binford,* 286 U. S. 394, (1932) there is no support for appellants' contention that in the exercise of this police power the States may ignore the consequent effects upon interstate commerce. In the former case (at page 143) discussing the validity under the Commerce Clause of a commission-made order this Court spoke of "reasonable regulations." In the latter case (at page 390) in the brief consideration the Court gave to the charge of invalidity under the Commerce Clause, the phrase "reasonable regulations" was quoted from *Morris* v. *Duby.* Of course, as will later appear, the dominant consideration in *Sproles* v. *Binford* was the validity of the law under the Fourteenth Amendment as there was no showing of a substantial burden on interstate commerce. The decision of this Court in these two cases is consistent with the principle that state police power must not unnecessarily burden interstate commerce. In these two cases the Court made no finding either that interstate commerce was substantially burdened or that the regulations exceeded a reasonable necessity for the exercise of the police power.

And with particular bearing on the instant case, it is significant that in the cases in which this Court has considered the validity under the Commerce Clause of State regulations governing the use of their highways, it has been careful to guard its language in prophetic anticipation of this day.

In *Hendrick* v. *Maryland,* 235 U. S. 610 (1915) Mr. Justice McReynolds said (at page 622):

> "The reasonableness of the state's action is always subject to inquiry in so far as it affects interstate commerce . . . ."

And in *Buck* v. *Kuykendall,* 267 U. S. 307, Mr. Justice Brandeis (at page 315) said:

> "Appropriate state regulations, adopted primarily to promote safety upon the highways and conservation in their use, are not obnoxious to the commerce clause, *when the indirect burden imposed upon interstate commerce is not unreasonable.*"

It cannot be doubted that highways are "public property," but to speak of the "absolute proprietary rights" of the State in its highways as justifying unrestricted regulation by the State—however unreasonable or however burdensome upon interstate commerce—is to ignore the fundamental character of that ownership and the deeper realities attendant upon it.

The emphasis should be put not upon the ownership of the highways by the State and its power over them, but rather upon its duties in regard to them growing out of its trusteeship for the public. One of the essential functions of government is to provide and keep open the avenues of travel and traffic.

The trusteeship of the state over its public highways is for the benefit not only of its own citizens but for the citizens of the United States also. This would be true, we believe, in the absence of Federal Aid, because such trusteeship would be implied from the Commerce Clause of the Federal Constitution. However, since over a period of twenty years the national government has co-operated with the state governments in develop-

ing a national system of interstate highways, there is added reason for this trusteeship. As the Supreme Court of the United States said, in *Bush* v. *Maloy*, 267 U. S. 317 (1925):

> "The federal aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that state highways shall be open to interstate commerce."

That the regulation of the public highways by the States is still within the compass of the Commerce Clause is reflected in the language of the Supreme Court in *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312, where Justice Brewer said:

> "We are so much accustomed to see artificial highways, such as common roads, turnpike roads and railroads, constructed under the authority of the States, and the improvement of natural highways carried on by the general government, that at first it might seem that there was some inherent difference in the power of the national government over them. But the grant of power is the same. There are not two clauses of the Constitution, each severally applicable to a different kind of highway. The fee of the soil in neither case is in the general government, but in the State or private individuals. The differences between the two are in their origin —nature provides the one, man establishes the other."

And as was said by Chief Justice Waite, in *Pensacola Tel. Co.* v. *West, etc. Tel. Co.*, 96 U. S. 1, at page 9:

> "Since the case of *Gibbons* v. *Ogden* (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes

within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

"The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."

And Mr. Justice Brewer observed *In re Debs,* 158 U. S. 564, 590:

"'Up to a recent date, commerce, both interstate and international, was chiefly by water, and it is not strange that both the legislation of Congress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come to be carried on mainly by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over

such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

"'Constitutional provisions do not change, but their operation extends to new matters; as the modes of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown—the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.'"

To remove the highways of the Nation from the protection of the principle that States may not needlessly obstruct interstate commerce will not only defeat the purposes of Federal-aid but will make impossible that "practical adjustment" of national and state interests which is the life of the Federal system. Remove this protection; and the future of national highway transport is doomed, for even though the Federal government be forced to build its own highways for this commerce, it will be a practical impossibility to correlate these highways with the great system of secondary and rural highways throughout the Union.

(C) Measured by this Principle and the Evidence in this Case the South Carolina Regulations Are Void.

The Significance of the Federal Highway Acts and the Conventions between the States and the Federal Government.

Appellees repeat what was unequivocally stated at the opening of Section III of this brief, that is, that no contention is here made that the Federal Highway Acts or the Conventions pursuant thereto between the forty-eight States and the Federal Government have superseded State power to limit the size and weight of motor vehicles, and therefore it is unnecessary for appellees to answer much of the debate in appellants' briefs as to this matter.

It is apparent that appellants have completely failed to comprehend the rationale of the District Court's consideration of the significance of the enactment and historical administration of the Federal Highway Acts.

We have reasoned in Subsection A above that State police power generally is subject to the constitutional limitation that it shall not unnecessarily burden and interfere with interstate commerce, and in Subsection B above, that the exercise by a State of its police power in regulating the use of its roads is also subject to this constitutional limitation. However, this is not to say that the application of this constitutional supervision of State police power can be applied as though by mathematical formula. The exercise of judicial jurisdiction in this regard must obviously be conditioned by a proper regard for the "practical adjustment" which is our Federal system of government. It is a constitutional limitation which the Judiciary is and should be reluctant to enforce except in those cases where the burden

imposed upon interstate commerce is so great and so plainly unnecessary as to demand its enforcement.

Thus, the degree to which interstate commerce is affected, as well as the degree to which the State laws exceeds its reasonable necessity, is a factor which conditions the application of the constitutional principle. It is in this respect that the Federal Highway Act and its historical administration have their significance. Under the Federal-aid acts the Federal Government and all of the forty-eight States have, for more than 20 years, co-operated in building a national, inter-connected interstate system of highways adequate to carry the commerce of the Nation, which has been described in Section I of this brief. When a State law, exceeding the reasonable necessity for its exercise, defeats the purpose of this undertaking by denying the use of its portion of that system to the normal interstate traffic, it becomes imperative for the courts to apply the constitutional protection of the Commerce Clause in order to protect the national interest. That the national interest in the Federal Highway Acts and in the national system of highways constructed thereunder might furnish the occasion for the application of the constitutional protection of the Commerce Clause is evident in the dictum of this Court in *Morris* v. *Duby*, 274 U. S. 135, where it was said:

> "Regulation as to the method of use * * * remains with the States . . . unless the regulation is so *arbitrary and unreasonable as to defeat the useful purposes* for which Congress has made its large contributions to bettering the highways systems of the union, . . ."

and in *Buck* v. *Kuykendall*, 267 U. S. 307, which held invalid a State statute denying the use of State high-

ways to an interstate carrier upon a finding that that use was not consistent with the public convenience and necessity, not only on the ground that it was a regulation of interstate commerce, but (at page 316) because "it also defeats the purpose of Congress expressed in the legislation giving Federal-aid for the construction of highways."

We are not attempting to exalt these dicta into principles of law by which this case can be determined under the doctrine of *stare decisis*. We do, however, believe that these dicta are a recognition by this Court that in a proper case the application of the constitutional principle upon which we rely may be conditioned by the effect of a State law upon the purposes and functions of the national highways system which it has been the purpose of the Federal Government and the forty-eight States to build up.

Appellants, unwilling to concede this, find it very difficult to read any other meaning into these dicta. Thus (S. C. Br. 131) they summarize their "affirmative position as to what the Court did mean" by the "unless clause" in *Morris* v. *Duby, supra*:

> "The meaning of the 'unless clause', shown by the propositions announced by the court in the preceding portion of that opinion, by the language used in that clause itself and by the application of that opinion in subsequent cases, notably the Sproles case and the Bradley case, is that, if a State statute enacted to preserve the highways or protect the traveling public is not so unreasonable and arbitrary as to violate the 14th Amendment, it does not violate the commerce clause nor conflict with the purposes of the Federal Highway Act in the absence of discrimination against interstate commerce. In other words, the purposes of Congress in the enactment of the Federal

> Highway Act are not, in any degree, an additional measure of the reasonableness of the State statute."

We are unable to understand how this exposition clarifies in any way the significance of the Court's dictum. Appellants (Ky. Br. 47) explain the dictum in *Buck* v. *Kuykendall, supra,* in this fashion:

> "In other words, it in effect held that the Federal Highway Act merely made explicit the implied prohibition against discrimination contained in the Commerce Clause"

but we cannot believe that the significance of the dictum can be reduced to such an absurdity. The implied prohibition against discrimination contained in the Commerce Clause does not need to be made explicit by any reference to the Federal Highway Act.

But, these dicta aside, we submit that the application of the protection of the Commerce Clause is fully justified under our constitutional system when a State law, *exceeding its reasonable necessity,* defeats the national undertaking represented by the interstate system of highways. The admission that the Federal Highway Acts did not supersede the power of the States to regulate the size and weight of motor vehicles engaged in interstate commerce over the interstate system, is recognition of the validity of State statutes which are found to be reasonably necessary for the safety and conservation of the highways, even though they may result in defeating the purposes of the Federal Highway Acts. Such effects are as unavoidable as the physical presence of mountain ranges or rivers across the paths of this commerce, but this is not to say that a State faced with a choice of method, *i. e.,* one form of regulation which will satisfy the necessities of

its highways but would nevertheless admit the relatively free passage of interstate commerce, and another method (as in the instant case) which will practically prohibit that commerce, may disregard the needs of interstate commerce and adopt the latter method. We do not believe that it is consistent, either with the prior decisions of this Court, or with that practical adjustment between the needs of the national Government and the States, that a State may arbitrarily ignore the needs of interstate commerce in this manner. The evidence in this record indicates, and the District Court has so found, that the State of South Carolina could achieve the conservation and safety of its highways as well, if not better, by the adoption of measures which have been approved by experience and expert judgment and thus avoid the disastrous effect upon interstate commerce which the threatened law will needlessly cause. Certainly the protection of the Commerce Clause should be extended to the protection of the great national investment represented in the national system of interstate highways.

The Significance of the Motor Carrier Act.

The discussion above of the significance of the Federal Highway Acts and their administration to the application of the constitutional principle in this case are likewise applicable to Part II of the Interstate Commerce Act (Motor Carrier Act, 1935), when it is considered that, as the District Court found, the enforcement of the South Carolina regulations will defeat the purposes and policies of the Congress of the United States as expressed in this Act. Again we make it clear that the District Court did not contend nor do appellees contend here that this Federal legislation supersedes State power to regulate the size and weight of motor

vehicles in interstate commerce, and it is apparent from the opinion of the District Court (R. 74) that it gave no such significance to this legislation. The District Court said:

> "There is another angle from which the reasonableness of police regulations burdening interstate commerce in this way must be judged. Not only has Congress aided in the construction of the roads so that they may become highways of such commerce, but in the enactment of the motor carriers' act, it has recognized truck traffic as a legitimate part of that commerce essential to the welfare of the public and subject to regulation for that reason. As said of Federal aid legislation in Bush & Sons Co. v. Maloy, 267 U. S. 317, 324, 45 S. Ct. 326, 327, 69 L. Ed. 627, this legislation regulating motor carriers is of significance because it makes clear the purpose of Congress that state highways shall be open to commerce of that character. Congress has not attempted to regulate size and weight and there are great practical difficulties in the way of such regulation by Congress. It is of great importance, therefore, that regulation of this matter by the states be held within reasonable bounds, and that they be not permitted, under guise of exercising the police power, to exclude from their highways by unreasonable regulations the interstate commerce which Congress is regulating in the public interest, and for the carrying of which it has aided in the construction of roads that form parts of a great national system of highways."

The importance of the Motor Carrier Act and its administration as a factor in determining the reasonableness of a state regulation affecting interstate motor carriers is shown in bold relief by recent decisions of the Interstate Commerce Commission interpreting and applying the Act.

In *Edwin A. Bowles Common Carrier Application*, 1 M. C. C. 589, p. 591 (decided March 13, 1937) the Commission said:

> "Interveners point out that the growth of motor-carrier transportation, and consequent diversion of traffic from the rails to the highways, has contributed to large traffic losses by rail carriers, a diminution of their revenues, and an impairment of the value of their securities. They contend that the public convenience and necessity do not require the proposed services and that the grant of a certificate to applicant would be inconsistent with the policy of Congress declared in section 202(a) of the act. One of the bases for this contention is that all of the origins and all of the destination, except Elkhorn, now have adequate service by rail. We are advised by statute that it is the policy of Congress to foster and preserve in full vigor both rail and water transportation, but we are also directed in section 202(a) to regulate transportation by motor carriers in such manner as to recognize and preserve its inherent advantages. There are certain inherent advantages in the transportation of petroleum products by motor vehicle. Among these are the reduction in amount of gasoline and other petroleum products which jobbers must keep on hand in storage tanks, and the elimination of the expense of trucking rail shipments of such products at destinations from tank cars to those jobbers who do not have storage facilities adjacent to the rail carriers' tracks. That a particular point has adequate rail service is not a sufficient reason for denial of a certificate; shippers and consignees of petroleum products are entitled to adequate service by motor vehicle as well as by rail."

And in *Pennsylvania Truck Lines, Inc., Acquisition of Control*, 1 M. C. C. 101, at p. 111 (decided October 8, 1935), the Commission said:

"While we have no doubt that the railroad could, with the resources at its command, expand and improve the partnership service and that, so far as numbers are concerned, there is now an ample supply of independent operators in the territory for the furnishing of competitive service, we are not convinced that the way to maintain for the future healthful competition between rail and truck service is to give the railroads free opportunity to go into the kind of truck service which is strictly competitive with, rather than auxiliary to, their rail operations. The language of section 213, above quoted, is evidence that Congress was not convinced that this should be done. Truck service would not, in our judgment, have developed to the extraordinary extent to which it has developed if it had been under railroad control. Improvement in the particular service now furnished by the partnership might flow from control by the railroad, but the question involved is broader than that and concerns the future of truck service generally. The financial and soliciting resources of the railroads could easily be so used in this field that the development of independent service would be greatly hampered and restricted, and with ultimate disadvantage to the public."

In the light of the declared purposes of Congress (Section 202(a)) "to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest," and "to promote adequate, economic and efficient service by motor carriers," and "to develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense," and in view of the foregoing interpretations of the

Motor Carrier Act by the Interstate Commerce Commission we think it obvious that this legislation gives occasion for the application of the protection of the Commerce Clause against State legislation which needless subverts and defeats the administration of the Federal Act and defeats the declared purposes and policies of Congress.

By Part II of the Interstate Commerce Act common carriers by water vehicle are charged with the duty of providing safe and adequate service, equipment and facilities for the transportation of property in interstate or foreign commerce, to establish, observe and enforce just and reasonable rates, charges and classifications, and to establish reasonable through routes and joint rates, yet the evidence is eloquent to the effect that the enforcement of the South Carolina regulations will effectively prohibit the exercise of these duties. The District Court specifically found (Finding of Fact No. 8, R. 78) that:

> "That weight and size of motor trucks are important factors in the fixing of interstate rates and that enforcement of the South Carolina law under consideration would necessitate increase of rates for transportation of commodities into, out of, and across South Carolina, would prevent the interchange of motor truck equipment and the establishment of through routes and joint rates on shipments moving into, out of, and across South Carolina."

We repeat again that it is implicit in the constitutional principle which we advance that if the needs of the State are such as to demand the regulations which it seeks to enforce, then the consequent effect of their enforcement upon the administration of the Federal legislation and their defeat of the purposes and policies

of Congress is unavoidable under our constitutional system, but it is equally obvious, as in the case of the Federal Highway Acts, that where the regulations are not demanded by the reasonable necessities of the State, and other methods or a different degree of limitation would satisfy the reasonable necessities of the State, the State may not arbitrarily ignore the demands of interstate commerce and arbitrarily defeat the purposes and policies of Congress.

Morris v. *Duby, 274 U. S. 135 and Sproles* v. *Binford, 286 U. S. 374, distinguished.*

There have been two decisions of the Supreme Court of the United States involving State regulation of size and weight of motor vehicles, *Morris* v. *Duby,* 274 U. S. 135 (decided April 18, 1927) and *Sproles* v. *Binford,* 286 U. S. 374 (decided May 23, 1932). In both cases the Court upheld the state regulations as reasonable.

Before discussing the facts and issues raised in these two cases, we will point out two pertinent principles affecting the application of the rule of Stare Decisis to constitutional issues.

First: The doctrine of Stare Decisis is not followed as rigidly in cases involving constitutional questions as in other cases, particularly where questions as to due process and burden on interstate commerce are raised.

The doctrine is applied more generally in cases interpreting the Constitution, rather than in cases involving the application of the Constitution to a particular state of facts.

It is the traditional policy of the Supreme Court of the United States not to formulate rules or to decide

questions beyond the necessities of the immediate issue. This policy applies with particular force to questions of due process and questions involving the commerce clause.

In *Euclid* v. *Ambler Co.*, 272 U. S. 365, Mr. Justice Sutherland, for the Court, said:

> "This is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the constitution as applied to the exercise of flexible powers of police, with which we are here concerned".

The constitutionality of an act is dependent always upon the facts and circumstances of the particular case at the time of the decision, which facts and circumstances may and do change from the time of the decision relied upon and a subsequent case under consideration.

The usual phrasing of the doctrine of Stare Decisis includes the important qualification that precedent is to be followed *unless conditions have so changed as to make the rule unwise or inapplicable.*

This principle was cogently stated by Mr. Justice Brandeis in his dissenting opinion in the case of *Burnett* v. *Coronado Oil and Gas Co.*, 285 U. S. 393:

"Stare Decisis is not, like the rule of res judicata, a universal, inexorable command. The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the Court, which is again called upon to consider a question once decided. . . . In the cases which now come before us, there is seldom any dispute as to the interpretation of any provision; the controversy is usually over the application to existing conditions of some well-recognized constitutional limitation. This is particularly true of cases under the due process clause when the question is whether a statute is unreasonable, arbitrary, or capricious; of cases under the equal protection clause, when the question is whether there is any reasonable basis for the classification made by statute, and of cases under the commerce clause, when the question is whether an admitted burden laid by a statute upon interstate commerce is so substantial as to be deemed direct. These issues resemble, fundamentally, that of reasonable care in negligence cases, the determination of which is ordinarily left to the verdict of a jury. In every such case, the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstance that decision of that fact is made by a court, instead of a jury, should not be allowed to obscure its real character."

Second: A statute valid when enacted may become invalid by change in the conditions to which it is applied.

The application of this principle is vividly illustrated by the case of *Abie State Bank* v. *Bryan,* 282 U. S. 765. There a law of the State of Nebraska assessing banks to build a fund to be used in guaranteeing bank deposits was attacked as a violation of due process, soon after its passage, in the Supreme Court of the United States and was held constitutional. Thereafter, the identical law was again attacked, and the doctrine of Stare Decisis was relied upon as a defense.

The Supreme Court, in holding the law to be unconstitutional, said:

> "A police regulation, although valid when made, may become by reason of later events, arbitrary and confiscatory in operation * * *. In the Shallenberger case, the suit was brought immediately upon the enactment of the law, and that decision sustaining the law cannot be regarded as precluding a subsequent suit for the purpose of testing the validity of the assessment in the light of *later actual experience.*"

A striking example of the rule that a decision may become inapplicable when conditions change is found in the case of *Vigeant* v. *Postal Telegraph Co.,* 260 Mass. 335, 157 N. E. 651 (1927). In that case a Massachusetts statute regulating the liability of telegraph companies for injuries caused by poles and wires, which had been held constitutional some years before, was held unconstitutional by the Supreme Court of Massachusetts. The court said:

> "When enacted its constitutionality was beyond question. . . . The statute as drawn was specifically

directed to the conditions existing at that time. It was rigid, not flexible, in terms. It was not framed to broaden in scope with changing conditions. It has become too narrow. . . ."

It does not strain the imagination of the Court to conceive of circumstances under which any law, fixing the maximum weight and width of motor vehicles, may become unreasonable and arbitrary under changed conditions. The law itself contains no method of compensating for such change. We submit, therefore, that the Court should be vigilant, in a proper case, in reviewing the application of such a law to the facts existing at the present time.

The decisions of this Court in *Morris* v. *Duby, supra,* and *Sproles* v. *Binford, supra,* reveal that in neither of these cases was there, *first,* a finding that the State regulations had exceeded the reasonable necessities of the State, and, *second,* that the burden imposed upon interstate commerce was substantial and amounted to a practical prohibition.

We have seen above that the District Court in this case found and was justified in finding that both of these conditions exist here and we have also seen that under established constitutional principles the concurrence of these two conditions, under the facts of this case, invalidates the South Carolina regulations under the Commerce Clause.

The case of *Morris* v. *Duby, supra,* was decided nine years ago before there was any real conception of the growth and importance of the motor industry and prior to the present development of interstate highways. It involved only an isolated stretch of highway twenty-two miles long. No evidence was taken, and the affidavits filed with the bill of complaint showed no substantial

burden on interstate commerce, and were particularly designed to show the extra cost which would be inflicted upon plaintiffs in that case. The instant case, on the other hand, involves all of the great arterial highways crossing the State of South Carolina and connecting with other interstate highways in surrounding States, forming an integral part of the national system of integrated highways. The evidence shows a drastic burden upon interstate commerce will be imposed by the enforcement of the South Carolina regulations, not merely to burden the plaintiffs with extra costs and obstruct their operations, but to practically prohibit motor commerce altogether to the prejudice of carrier and shipper alike. The evidence shows that indispensable functions of interstate commerce will be prohibited. When this case was decided the Motor Carrier Act of 1935 had not yet been passed, and consequently the policies and purposes of Congress expressed therein could not be considered as a factor affecting the reasonableness of the law or the extent to which it burdened interstate commerce, and in that case this Court was careful to point out that "while regulation as to the use of the highways remains with the States," that regulation must not be "so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union." In the instant case the District Court has found that these purposes will be defeated by the enforcement of the South Carolina regulations.

The case of *Sproles* v. *Binford, supra,* was decided more than five years ago, likewise before the development of transportation by motor truck had reached its present importance, and before the Congress of the United States had undertaken comprehensive regulation and promotion of the industry.

There was no proof that the enforcement of the Texas regulations would defeat the purposes of Federal-aid nor was there any substantial proof of a burden on interstate commerce. Neither of the two conditions which concur to invalidate the South Carolina regulations in this case were found by the District Court in *Sproles* v. *Binford*. Not only was there no showing of a burden on interstate commerce in any way comparable with the drastic burden which it has been found will be inflicted by the enforcement of the South Carolina regulations, but the District Court in that case made specific findings that the Texas law did not exceed the reasonable necessities of the State.

An examination of the findings of fact in the District Court, which were recited in the decision of this Court as a basis for confirming the judgment of the District Court, reveals that the conditions existing in Texas at the time this law came under attack were totally different from the conditions now existing in South Carolina.

The District Court found that in Texas at the time of the trial "there are highways of concrete and other rigid and semi-rigid types of construction and also bridges capable of carrying a greater load than 7,000 pounds, *but these do not form a regularly connected system and are scattered throughout the State.*"

In contrast, the District Court in this case, found that there exists in South Carolina today a splendid, interconnected system of standard highways, which is a portion of the primary Federal-aid system and an integral part of the national interstate system of highways, connecting with arterial highways which carry the interstate traffic of the Atlantic seaboard, and in fact traffic originating in and destined to all parts of the Nation. It further found that this system of highways was by

its design, and as proved by the experience of more than seven years, adequate to carry the present traffic both interstate and intrastate.

Appellants (S. C. Br. 92 to 94) attempt to attack this finding by a Table which lists the seven arterial highways specifically named in the District Court's decree, but their figures but illustrate the correctness of the District Court's finding. Thus, of the total of 1,134 miles on these 7 highways across the State of South Carolina, only 3.1 per cent or 35 miles; is shown as not surfaced either with concrete, bituminous macadam, or bituminous concrete, which the evidence disclosed was of the best type and to be ably supporting the present traffic without damage.

IV.

LIMITATION OF INJUNCTIVE RELIEF BY DISTRICT COURT.

In Section I of this brief was described the substantial burden which will be imposed on interstate commerce by the enforcement of the South Carolina regulations. In Section II it has been shown that this burden will be needlessly and arbitrarily imposed by regulations which exceed the reasonable necessity for their exercize, and in Section III we have shown that under the evidence in this case the concurrence of these two conditions invalidates the regulations under the Commerce Clause and entitles the plaintiffs to injunctive relief. In Section IV we will contend that the limitation of injunctive relief by the District Court was not a usurpation of the legislative prerogative, as contended by appellants, but a proper and valid exercise of its broad equitable discretion and necessary for the protection of the public interests of the State of South Carolina.

The brief of appellants, original defendants, devotes its Point IV to the contention that the exercise by the District Court of its equitable discretion to limit and condition the extent of the relief granted was an usurpation of the legislative prerogative. They say (at page 140): "Obviously there are only two ways in which the effect of a statute may be changed as the Court has changed the statute in the instant case: (1) either by purely legislative act, or (2) by judicial pronouncement of severability."

Counsel for appellants have misinterpreted the intention of the District Court and the effect of its decree. The Court was neither attempting to assert the severability of the statute, nor attempting to prescribe the lawful limitations of weight or size. The Court had found the regulations unconstitutional as they affected

the plaintiffs when operating in interstate commerce over the main and capable interstate highways across South Carolina. The Court had found (Finding of Fact No. 7, R. 78) "that enforcement of the South Carolina law would result in the obstruction of the flow of interstate commerce into, out of, and across the state of South Carolina . . . and would render it practically impossible for a large part of interstate commerce now conducted by truck to use the roads of that State;" and (Finding of Fact No. 18, R. 81) "that Federal highways numbered 1, 15-A, 17, 21, 25, 29 and 52 comprise the great arteries of interstate commerce through the State of South Carolina, are of standard concrete paving as above described, with the exception of a few short stretches, a few miles in length, which are not of sufficient importance to justify the denial of the use of these arteries of commerce for the purpose for which they were constructed," and (Finding of Fact No. 19, R. 82) "that there are a few old bridges on the main arterial highways above mentioned and also on the other roads paved with standard concrete paving which were not designed for carrying trucks of greater weight than 20,000 pounds and a few which are too narrow to permit the use of trucks 96 inches in width, and as to these the provisions of the law cannot be deemed unreasonable; but that, as these bridges are few in number" and that (Opinion, R. 75) "interstate commerce, or at least a large part of it, could be so routed as to avoid them entirely. We think, however, that where it is the intention of the defendant to enforce the provisions of the act with respect to any bridge on the roads constituting the arteries of interstate commerce to which we have referred, or on other roads paved with standard concrete paving, notices to that effect should be posted on both sides of the bridge, of sufficient size and character

to give ample warning that the use of the bridge is forbidden to trucks with a gross weight in excess of ten tons or of a width exceeding 90 inches. As the bridges in question are probably capable of carrying the traffic as they have been carrying it for the past five years, we feel justified in enjoining the enforcement of the act as to them unless notice is posted as herein indicated," and (Finding of Fact No. 24, R. 83) "that the width limitation of 90 inches is unreasonable when applied to the standard concrete highways of the state and the arteries of interstate commerce heretofore mentiond. In view of the fact that all other states in the Union permit a width of 96 inches, this is the standard width of trucks engaged in interstate commerce, and the enforcement of the 90 inch limitation would exclude from the highways a large portion of the equipment now used in interstate commerce without material advantage to the safety or preservation of the highways."

Having concluded that the practical prohibition of interstate commerce created by the regulation was unconstitutional, the Court faced the problem of the nature of the relief it should grant. Obviously it faced an intricate and difficult problem, conditioned by two purposes: first, to enjoin the enforcement of the unconstitutional regulations to the extent that interstate commerce might continue to move and not be completely destroyed but yet to limit and condition the injunction so as to protect the safety and conservation of the public highways of South Carolina. Appellants argue (S. C. Br. 142, 143) that a court of equity has no power to cope with such a problem and that its attempt to do so in this case nullifies its decree and proves the validity of the law. This argument but begs the question. In determining the validity of the limitations and conditions applied by the lower court to the relief granted,

the correctness of the Court's general conclusion of law that the regulations were unconstitutional is to be assumed. The grant of injunctive relief by courts of equity is often fraught with practical difficulties which must admit of reasonable discretion.

We submit that the lower court exercised an eminently proper discretion by the limitations which conditioned the relief it granted. It confined the protection of the injunction to main arterial highways, which were known from the evidence to be safely carrying the present commerce; it denied the protection of the injunction to vehicles over 96 inches in width, because it knew from the evidence (R. 155) that from 85 per cent to 90 per cent of all vehicles now using the highways were 96 inches in width; it denied the protection of the injunction to such bridges as might be posted by the State Highway Department as too weak or narrow for the present traffic, and finally, "in order that the use of the bridges may not be unreasonably denied to plaintiffs, and that no hardship may result from the enforcement of our injunctive order with respect to contingencies which may arise and which we are not able now to foresee" jurisdiction of the cause was retained to the end that the injunctive order may be modified as occasion for such modification may arise (R. 75).

It must be borne in mind that the Court by its decree was not opening up the roads of South Carolina to a use they had not hitherto experienced. *The regulations which it conditionally enjoined had never been enforced* (R. 209, 210). In the exercise of its discretion, a court of equity need not shut its eyes to realities.

The conditions imposed by the Court upon the relief granted were restrictive of the appellees; were for the benefit and protection of the State. It cannot complain of that which is done to its benefit.

In the light of the real purpose and effect of the lower Court's decree, we can now examine the soundness of appellants' argument, summarized as follows (S. C. Br. 140):

> "Our argument at this point is devoted to the following proposition: (a) The Court lacked the power to classify the roads and bridges or to rewrite the width limit as those are solely legislative functions, and (b) since the Court lacked such power it was required, under the record evidence and the applicable rules of law, to hold the entire Act valid as to all roads and bridges."

It is conceded that the court below lacked "the power to classify the roads and bridges or to rewrite the width limit," but it did have the power, within a reasonable discretion, to extend the protection of its injunction to a certain class of highways only[1] and only to vehicles of such a width as had theretofore been using the highways and would not increase the hazards

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[1] The Court in its decree (R. 85) limited the protection of its injunction to the specified highways and "other Federal aid highways as may be of standard concrete or concrete and asphalt construction". The evidence in the case demonstrated that the greater portion of interstate traffic involved in the case used this class of highways. The Court did not confine its decree to highways upon which *Federal aid money had been spent*. This was in recognition of the principle asserted by this Court in *Bush* v. *Maloy*, 267 U. S. 317, where it was said (at page 324):

> "The Federal Aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those Acts make clear the purpose of Congress that State highways shall be open to Interstate Commerce."

It has been persuasively estimated that about 90% of all interstate motor carrier traffic moving over primary or trunk highways is carried over highways in the Federal-aid system. *Michigan Law Review*, Vol. 33, No. 2, Dec. 1934—Regulation of Motor Carriers, at page 247. (Cited by appellees in their trial brief.)

thereon. Such an exercise of equitable discretion is a proper judicial function and not the usurpation of legislative functions.

Appellees sought by the prayer of their bill broader relief than that granted by the lower court. Yet they have not cross-appealed from that portion of the decree imposing equitable conditions upon the relief granted, recognizing that their claim to injunctive relief "yields to the impact of converging equities."[1]

Nor does it detract from the validity of the Court's decree that it modified the relief prayed for. In *Walden et al.* v. *Bodley, et al* 14 Peters, 156, 164, this Court said:

> "A Court of Equity cannot act upon a case which is not fairly made by the bill and answer. But it is not necessary that these should point out, in detail, the means which the Court shall adopt in giving relief. Under the general prayer for relief, the Court will often extend relief beyond the specific prayer, and not exactly in accordance with it. Where a case for relief is made in the bill, it may be given by imposing conditions on the complaint consistently with the rules of equity, in the discretion of the Court."

Appellants' contention that the conditioning of the grant of equitable relief is an usurpation of legislative power finds its answer in the language used in *Public Service Ry. Co.* v. *Board of Public Utility Commissioners* (1921) 276 F. 979. The Court had granted a preliminary injunction restraining a confiscatory rate, but named a maximum rate as a condition of the injunction. It was said (at page 990):

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[1] *Atlantic Coast Line R. Co.* v. *Florida*, 295 U. S. 301, 313.

" . . counsel for the Board have quite pertinently called the court's attention to the fact that it is not a rate-making body and have made the point that if the court name a rate as a condition for granting an injunction, it would, in effect, fix a new rate and would thereby exceed its function. That it would exceed its function as a rate-making body is very true, because, not being such a body, it has no such function. But that in so doing it would exceed its power as a court of equity is not true. Injunction is one of the equitable remedies over which the court has jurisdiction. The remedy of injunction may be granted in the terms of the prayer or it may be granted only upon condition that the party seeking equity shall do equity, as in this instance, that the Company shall consent to charge a fare no greater than what the court deems necessary to avoid confiscation. If the naming of a condition is in effect the fixing of a rate, the sanction for the court's act is in the injunction and in the circumstances that make injunction imperative. This rule is ancient and of wide application. *Walden* v. *Bodley,* 14 Pet. 156, 164. (citing other cases)"[1]

In *Newton* v. *Consolidated Gas Co.* (1921) 258 U. S. 158, this Court sustained the action of a District Court restraining a confiscatory rate but fixing a maximum rate as a condition to relief, saying (at page 177): "It was within the court's discretion to grant the injunction upon terms and we cannot now say that the limitation upon charges amounted to abuse." The opinion concluded (at page 178):

"It seems proper to add that we do not intend by anything said herein to intimate what would have been a reasonable rate for the sale of gas

[1]Appeal "dismissed per stipulation". Memo. decision 266 U. S. 636.

> under the circumstances disclosed. The eighty-cent rate was confiscatory; the one dollar and twenty-cent maximum imposed by the court during a specified period as a condition to the injunction was a limitation in favor of the consumers."

The District Court which entered the decree in this case might well have paraphrased this language when it conditioned its decree:

> 'It seems proper to add that we do not intend by anything said to intimate what *weight or width limit is within the reasonable necessity of the State* under the circumstances disclosed. *The present limitations impose an unconstitutional burden on interstate commerce; the conditions and limitations hereby imposed* as a condition to the injunction is a limitation in favor of the State of South Carolina.'

The power of a court of equity to protect the public interest by granting extraordinary relief only upon equitable conditions has recently been reiterated by this Court in *Central Kentucky Co.* v. *Commission,* 290 U. S. 264, 271 (1933):

> "The power of a court of equity, in the exercise of a sound discretion, to grant, upon equitable conditions, the extraordinary relief to which a plaintiff would otherwise be entitled, without condition, is undoubted. It may refuse its aid to him who seeks relief from an illegal tax or assessment unless he will do equity by paying that which is conceded to be due. *State Railroad Tax Cases,* 92 U. S. 575; *Cummings* v. *National Bank,* 101 U. S. 153; *Peoples National Bank* v. *Marye,* 191 U. S. 272, 287; see *Norwood* v. *Baker,* 172 U. S. 269, 294. It may withhold from a plaintiff the complete relief to which he would otherwise be entitled if the defendant is willing to give in its stead such sub-

stituted relief as, under the special circumstances of the case, satisfies the requirements of equity and good conscience. *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338. It may prescribe the performance of conditions designed to protect the rights of the parties pending appeal, *Hovey* v. *McDonald*, 109 U. S. 150, 157; or to protect temporarily the public interest while its decree is being carried into effect. See *Consolidated Gas Co.* v. *Newton*, 267 Fed. 231; 273; *Newton* v. *Consolidated Gas Co.*, 258 U. S. 165."

CONCLUSION.

It is respectfully submitted that upon the reasoning and authorities above set forth the decree of the District Court should be affirmed.

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December 8, 1937.

APPENDIX I.

Section 6 and 7 of "An Act To Regulate And Limit The Use Of Highways" enacted by the General Assembly of South Carolina, May 12, 1937, but vetoed by the Governor of that State on May 19, 1937, this veto being sustained by the House.

(A copy of the complete Act, certified by the Secretary of State of South Carolina, is on file in the Clerk's Office of this Court, and appellants' counsel have been advised of the possibility of reference by appellees' counsel to this document in brief or oral argument.)

SECTION 6. Wheel and Axle Loads.

(a) The gross weight upon any wheel of a vehicle shall not exceed the following:

1. When the wheel is equipped with a high pressure, pneumatic, solid rubber of cushion tire, 8,000 pounds.

2. When the wheel is equipped with a low pressure pneumatic tire, 9,000 pounds.

(b) The gross weight upon any one axle of a vehicle shall not exceed the following:

1. When the wheels attached to the axle are equipped with high pressure pneumatic solid rubber or cushion tires, 16,000 pounds.

2. When the wheels attached to the axle are equipped with low pressure pneumtic tires, 18,000 pounds.

(c) For the purpose of this Section an axle load shall be defined as the total load on all wheels whose centers are included within two parallel transverse vertical planes not more than 40 inches apart.

(d) For the purpose of this Section every pneumatic tire designed for use and used when inflated with air to less than 100 pounds pressure shall be deemed a low-pressure pneumatic tire and every pneumatic tire inflated to 100 pounds pressure or more shall be deemed a high-pressure pneumatic tire.

SECTION 7. Gross weight of vehicles and loads:

(a) No vehicle or combination of vehicles shall be moved or operated on any highway when the gross weight thereof exceeds the following:

1. The gross weight upon any one axle of a vehicle shall not exceed the limits prescribed in Section 6 of this Article.

2. Subject to the limitations prescribed in Section 6 of this Article the gross weight of any vehicle shall not exceed 30,000 pounds.

3. Subject to the limitations prescribed in Section 6 of this Article the gross weight of any combinations of vehicles shall not exceed 45,000 pounds.

4. The provisions of this or any other Act to the contrary notwithstanding, it is hereby authorized and directed that in no case shall the gross weight in pounds of any vehicle or combination of vehicles exceed the product of the distance, in feet, between the front axle and the rear axle plus 40 feet, and a coefficient of 700.

* * *

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937.

No. 161.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL, APPELLANTS,

v.

BARNWELL BROS. INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

OTTO KERNER,
Attorney General of the State of Illinois,
AMICUS CURIAE.

PHILLIPS BROS. PRINT SPRINGFIELD, ILLINOIS. (41882—50)

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

BRIEF OF OTTO KERNER, ATTORNEY GENERAL OF ILLINOIS, AS AMICUS CURIAE.

STATEMENT OF CASE.

The Appellees have challenged the validity of a statute of the State of South Carolina which places a legal limit upon the widths and weights of motor vehicles permitted to use the public highways of the State.

The court below found that the statute is so unreasonable and arbitrary that it places an undue burden upon interstate commerce.

State roads are the property of the respective states. The importance of the case from the standpoint of the states is that the Appellees assail the right of the states to regulate the manner of use of their property, viz., the use of their highways.

The chief concern of the *amicus curiae*, the Attorney General of Illinois, is the application of the Commerce Clause of the Constitution of the United States to the facts involved in the appeal in so far as the decision of this court may, as a rule of law, affect the power of Illinois to regulate the use of its highways.

Public roads are artificial facilities furnished by the states to provide for transportation of persons or property, on foot or in vehicles. In this they differ essentially from waterways the ownership of which, is held by the states subject to the servitude of Congress to control navigation. Waterways are natural facilities used for transportation between the States and the United States and foreign countries. The distinction between waterways and roads is very broad and was commented upon at length in the case of *Railroad Company* v. *Maryland*, 88 U. S. 456, at page 470.

In the *Minnesota Rate Cases*, 230 U. S. 352, this court, in citing *Railroad Company* v. *Maryland*, *supra*, had this

to say, (p. 416) "It has never been doubted that the state could, if it saw fit, build its own highways, canals and railroads. (*Railroad Company* v. *Maryland*, 21 Wall. 456, 470, 471.) It could build railroads traversing the entire state and thus join its border cities and commercial centers by new highways of internal intercourse to be always available upon reasonable terms. *Such provision for local traffic might indeed alter relative advantages in competition, and, by virtue of economic forces, those engaged in interstate trade and transportation might find it necessary to make readjustments extending from market to market through a wide sphere of influence; but such action of the state would not for that reason be regarded as creating a direct restraint upon interstate commerce and thus transcending the state power.*"

Public roads are maintained by the states in their sovereign capacities in the discharge of their duties to their citizens. They are designed and built primarily for the use of their own citizens who may desire to use them within the limits of the states. Although they may furnish the means for the carrying on of commerce between states by motor vehicle, yet that is but an incident of their use. Their primary purpose is to provide for commerce within the limits of the respective states.

The important question before the court is whether or not the Commerce Clause is broad enough to give this court jurisdiction over the manner of use of state property, if

such property may be used incidentally in the carrying on of interstate commerce. It is to be observed that the states themselves do not engage in interstate commerce. They merely furnish facilities over which it is possible for others to do so. In this discussion, we do not deal with the jurisdiction of the court provided by the Equal Protection and Due Process Clauses of the Fourteenth Amendment or Section Two of Article Four of the Constitution of the United States insuring the citizens of each state all privileges and immunities of citizens in the several states. Our argument is only concerned with the Commerce Clause.

SUMMARY OF ARGUMENT.

I.

A statute with a legitimate object and employing means related to the object is not open to attack because it indirectly affects interstate commerce. (*Everard's Breweries* v. *Day*, 265 U. S. 545-559; *N. Y. N. H. and H. Railroad* v. *New York*, 165 U. S. 628-629; *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422-427). If the means provided by a statute are related to the object, the legislative power is not to be disturbed. Whether such means are reasonably necessary is not for the determination of a court. (*Arizona* v. *California*, 283 U. S. 423-455-456.)

That heavy motor vehicles are destructive of roads is a fact of common knowledge. That has been observed by this court in *Hendrick* v. *Maryland*, 235 U. S. 610, and in other cases. Limitations of sizes and weights of motor vehicles have a direct relation to the conservation of roads. The question of what degree of limitation is reasonably necessary is, therefore, not open to judicial inquiry, since the limitation is related to the object. The efficacy of the means employed is a legislative question. Whether or not the limitations of the South Carolina statute are more than necessary to conserve its highways would necessitate the court to determine what degree is necessary. That would be an invasion of the legislative field.

II.

A state may indiscriminately refuse to permit the use of its highways for the purpose of gain or condition the manner of use for such gainful purpose as it sees fit according to its uncontrolled judgment.

The use of public highways for the purpose of gain is special and extraordinary. It is a privilege, not a right. (*Stephenson* v. *Binford*, 287 U. S. 251-264; *Packard* v. *Banton*, 264 U. S. 140-144; *Hodge Co.* v. *Cincinnati*, 284 U. S. 335-337; *Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583-562.) Congress can regulate the business of an interstate motor carrier, if the state permits him to operate at all; but it is the inherent right of the state to condition the carried's manner of use of its highways, or his right to use the highways, provided its action is indiscriminate.

III.

In its prohibitions legislation may properly include the innocuous where its exclusion would make the enforcement of the law more difficult and the statute less effective. Its inclusion has its justification because it is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of government. (*Purity extract Co.* v. *Lynch*, 226 U. S. 192; *Village of Euclid* v. *Amber Realty Co.*, 272 U. S. 365; *Semler* v. *Oregon State Board*, 294 U. S. 608; *Booth* v. *Illinois*, 184 U. S. 425; *Otis* v. *Parker*, 187 U. S. 606; *Pierce Oil Co.* v. *City of Hope*, 248 U. S.

498.) Applying the foregoing principle to the type of statute in question, we say that a state has the right to adopt one set of limitations for the regulation of all of its highways, wide and narrow, strong and weak. To apply limitations varying with the width or bearing power of each particular highway or set of highways upon the entire road system of a state, all of which are interconnecting, would involve such a labyrinth of different regulations as to make the statute unenforceable. Without one set of limitations applicable to all highways, the statute could not be enforced. Any statute of this nature is to be judged by its application to all of the rural highways, city streets and bridges in a state. It is not to be judged by the selection of a few of the stronger and wider highways from the state system and applying it to them alone.

IV.

The sole and exclusive power to regulate the manner of use of highways by vehicles operated for gain is in the States. The Commerce Clause gives no jurisdiction to Congress in such matters. For that reason the court below was without jurisdiction to nullify the South Carolina statute under the authority of the Commerce Clause.

State legislation, limited to internal commerce is not invalid because it may affect the latter indirectly. (*The Minnesota Rate Cases,* 230 U. S. 352-410; *Schechter Corp.* v. U. S., 295 U. S. 495.)

V.

The regulatory power of Congress over state roads is limited to the power to regulate the business of interstate commerce. State regulations for the protection of state property do not regulate the business of interstate commerce and Congress has no jurisdiction in such a field.

The Commerce Clause has no application to state statutes enacted for the purpose of conserving assets of the States. (*Geer* v. *Connecticut*, 161 U. S. 519; *Ward* v. *Race Horse*, 163 U. S. 504; *Silz* v. *Hesterberg*, 211 U. S. 31; *Carey* v. *South Dakota*, 250 U. S. 118; *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349; *U. S.* v. *Shauver*, 214 Fed. 154; *U. S.* v. *McCullogh*, 221 Fed. 288.)

VI.

A regulation by Congress of State power to conserve its roads would not be a regulation of the business of interstate commerce. It would be a taking of property for a public use without compensation in violation of the Fifth Amendment to the Constitution of the United States.

Congress could not provide for the manner of use of state roads without properly exercising the power of eminent domain. The provisions of the Fifth Amendment protect state roads from seizure by the United States without payment of compensation just as much as private property. (*St. Louis* v. *Western Union Telegraph Co.*, 148 U. S. 92-100; *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160-169). So full is the ownership of their roads

that the States may even exact tolls for their use from the United States. (*Searight* v. *Stokes,* 44 U. S. 150-170, per Chief Justice Taney.) (Note—The States may have bargained away the right to collect tolls by accepting the benefits of the Federal Highway Acts, See Part X of Argument.)

The Fifth Amendment is a limit upon Congress in the exercise of its powers under the Commerce Clause, (*Monangahela Navigation Co.* v. *U. S.,* 148 U. S. 312-336.) as well as a limit upon the exercise of other great powers of Congress, such as the bankruptcy power (*Louisville Bank* v. *Radford,* 295 U. S. 555-589) and the power to tax (*Heiner* v. *Donnan,* 285 U. S. 312-326).

Taking from the states the power to determine how their property shall be used is a conversion of property.

The right of ownership of property, within the meaning of constitutional provisions requiring the making of compensation upon the taking of property for a public use, includes not only the tangible subject matter or corpus, but every right to use and exercise full dominion and control over it. (*Scott* v. *Manhattan Ry. Co.,* 17 N. Y. S. 364-365; *Old Colony and Fall River R. R. Co.* v. *County of Plymouth,* 14 Gray 155-161, per Chief Justice Shaw; *Pumpelly* v. *Green Bay Company,* 80 U. S. 166-167.)

There is a distinction beween governmental interference with the use of private property as a police power measure and the taking of property for a special public

use. Whenever a legislative act attempts to deprive the owner of some substantial interest in his property, the act becomes one of eminent domain. (*1 Lewis on Eminent Domain,* Sec. 6, 1909 Ed.) Even though the title to property be not taken, a deprivation of the right of use is a taking within the scope of the Fifth Amendment. (*U. S.* v. *Lynah,* 188 U. S. 445.) Whenever the right of the possession, use or enjoyment of property is in any degree abridged by the power of eminent domain, the property is pro tanto taken and the owner is entitled to compensation. (*Vol. 4, McQuillen on Municipal Corporations,* Sec. 1589, Second Ed.) Subjecting property to a public servitude is a taking. (*Peabody* v. *U. S.,* 231 U. S. 530.) Cooley's definition of eminent domain includes the controlling of the use of private property for the public benefit, without regard to the wishes of the owner. (Cooley's *Constitutional Limitations,* 1927 Ed., pp. 1109-1110.)

There is a vast difference between a police regulation restricting the owner in his own use of his property, such as a zoning ordinance, and a governmental fiat requiring him to suffer restrictions to be placed upon his property, *not for his own use, but for a special use by others.* The latter situation is exactly what would result in case Congress should require the states to permit the use of their roads by private parties engaged in interstate commerce with vehicles having whatever weights and dimensions which Congress might allow without regard to the wishes of the States. The States would not only be restricted

to whatever use of the roads they might want to make themselves, *but they would be required to submit the use of their property to third persons against their will and in accordance with the will of Congress.*

Such regulations by Congress would amount to the nationalization of state property without the consent of the states.

Since it is a taking of private property for a public use without just compensation for a state to compel a private business to dedicate its property to the public use by converting it into a public utility against its will (*Producers Transporation Co.* v. *R. R. Co.*, 251 U. S. 228-230; *Michigan Commission* v. *Duke*, 266 U. S. 570-578) then by the same token we say that Congress cannot compel the dedication of state property for the use of interstate commerce against the will of the States without complying with the Fifth Amendment. The states have never dedicated their roads to the national government for the use of interstate commerce.

The power of Congress over state roads is limited to regulating the business of interstate commerce, such as the fixing of interstate rates, the issuance of certificates of convenience and necessity and the like. The determination by Congress of the dimensions and weights of vehicles permitted to use state roads would be a usurpation of the power of the States to conserve their own property and not a regulation of *the business of interstate commerce.*

VII.

In the ownership of their roads, the states are not engaged in the business of interstate commerce as in the case of a manufacturer who ships goods in interstate commerce or a railroad company which transports cars from state to state. We contend that property of a State held in its sovereign capacity, not used by the state in carrying on the business of interstate commerce, built entirely within the confines of the State, and used, not by the State, but by third parties as an incident to the passage of vehicles in interstate commerce is not subject to the imposition by Congress of the servitude of interstate use by whatever type of vehicle Congress may will the freedom of use. Two sovereigns cannot control the manner of use of property at the same time. A concurrent power in two distinct sovereigns to regulate the same thing at the same time is inconsistent with sovereignty. (*The Passenger Cases,* 7 Howard 282-398.)

Bridge companies which furnish the instrumentality by which those engaged in interstate commerce may pass from state to state or from this country to Canada are not engaged in interstate or foreign commerce. It is the persons who use the bridges who are engaged in such commerce. (*Henderson Bridge Co.* v. *Kentucky,* 166 U. S. 150-153; *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board,* 294 U. S. 150-153.) Such a situation is strikingly similar to state owned roads. It is unlike that of

intrastate instrumentalities owned or controlled by railroads engaged in interstate commerce, as units in an interstate system. (*Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331; *Texas and Pacific Ry. Co.* v. *Gulf etc. Ry. Co.*, 270 U. S. 266; *Venner* v. *Michigan Central R. R. Co.*, 271 U. S. 127.) It is not like that of a state owned railroad engaged in the business of hauling freight with its own engines and making connections with interstate lines. (*U. S.* v. *California*, 297 U. S. 175.)

VIII.

No analogy can be had in the case of governmental regulation of public utiltiy companies. Such companies, by devoting their businesses to the public use grant the public an interest in that use to the extent of that interest and must submit to public control for the common good. (*Munn* v. *Illinois*, 94 U. S. 113-126; *Wolf* v. *Industrial Court*, 262 U. S. 522-535.)

Equally inapplicable is the analogy of the interstate railroad company or the manufacturer who ships his goods in interstate commerce. They must submit to control by Congress as the price of the privilege of engaging in interstate commerce. A state is not engaged in the business of interstate commerce. Its roads are held in its sovereign capacity and are not designed for the carrying on of interstate commerce by the state. The roads do not leave the confines of a state. Neither are they intrastate units or local branches or extensions of an interstate system as in the case of railroads.

The foundation of Congressional jurisdiction over the abandonment of an intrastate railroad is that it is operated as a branch of an interstate system and its continued operation at a deficit might impair the business of the system as an artery of interstate commerce. (*Colorado* v. *U. S.*, 271 U. S. 153.) The continued operation, solely in intrastate commerce, of an intrastate railroad owned by a local corporation is of purely local concern. (*Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204-216.) The underlying theme in all of the cases sustaining the regulations of Congress over the intrastate operations of railroads is that an interstate system uses the same instrumentalities to serve both intrastate and interstate commerce and regulation by Congress is necessary to secure efficient performance of interstate functions. A resume of such cases was made by the court in the case of *Colorado* v. *U. S.*, *supra*, at pages 163-164-165.

IX.

The power of Congress to regulate navigable waters cannot be made the basis of establishing similar power in Congress over state roads. This power of Congress is *sui generis*. It is based upon the power to control navigation. The word "commerce" as used in the Constitution includes navigation. The power over commerce, including the control of navigation, was one of the primary objects for which the people adopted their government. (*Gibbans* v. *Ogden*, 9 Wheaton 1-190; *Gilman* v. *Philadelphia*, 3 Wallace 713-724.) State roads, which are artificially con-

structed, and waterways, which are natural highways, have no similarity as far as control of Congress is concerned. (*Railroad Company* v. *Maryland*, 88 U. S. 456-470.)

The reason that the Fifth Amendment does not protect the owners of beds and shores of navigable waters from damages done by the United States in performing work in aid of navigation is that their ownership is subject to the servitude to control navigation created in favor of the Federal government by the Constitution. (*Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251-259; *Gibson* v. *U. S.*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141.) State roads are subject to no such servitude.

X.

The previous decisions of this Court, touching upon state regulations of roads do not sustain the power of Congress to remove from the states the right to conserve their roads.

XI.

State power to conserve state roads has not been surrendered by the States to Congress by the acceptance of the benefits of the Federal Highway Acts. The history of the legislation in Congress is to the contrary. The aim of Congress in making its appropriations to the States was to aid them in building post roads which roads should be free from toll. The only obligation placed upon the states by the Federal Highway Acts was that the highways should remain open for the passage of the mails and the roads should be toll free.

ARGUMENT.

I.

A state statute with a legitimate object and having means related to the object is not open to attack because it indirectly affects interstate commerce.

Admittedly, if the avowed object of a state statute is to discriminate between residents and non-residents or to regulate the passage of commerce in or out of a state, then such a statute is a regulation of the business of interstate commerce, which is forbidden by the Commerce Clause. On the other hand, if the real or apparent object of the statute is that of the management and control of the property of a state, the regulation is not one of interstate commerce, even though those entering or leaving the state and using its highways for the purpose of gain may not do so without subscribing to the regulations of the State. The efficacy of the statute is to be determined by the owner of the property, the State. It is not for others to say that the statute has fallen short of its goal if its end be legitimate and the means employed are related to it.

The judicial power to inquire into the motives of legislation is lacking. If the means provided by a statute are not unrelated to its object, the legislative power is not to be disturbed. Whether such means are reasonably necessary is not for the determination of a court. Such was the gist of the opinion of the court in the case of *Arizona* v.

California, 283 U. S. 423-455-456. There Arizona contended that the pretension of Congress that the construction of Boulder Dam was for the purpose of navigation was false. The Court refused to inquire into the motives of Congress for the reasons just given.

The reasoning in that case applies exactly to the case at bar.

(1) Congress has full power to regulate and control navigation.	(1) The states have full power to govern the manner of use of their property.
(3) Where the means provided by Congress to control navigation are not unrelated thereto, then whether or not they are reasonably necessary to achieve the result is not for the determination of the court.	(2) Where the means adopted by a state to conserve its property are not unrelated thereto, then whether or not they are reasonably necessary to achieve the result is not open to judicial inquiry.

The General Assembly of South Carolina has left no doubt but that the object of the statute in question is for the protection of its roads. Section One of the Act (South Carolina Statutes at Large of 1933, p. 341) is as follows:

> "Public Policy—Be it enacted by the General Assembly of the State of South Carolina: It is hereby declared to be the public policy of this State that heavy motor trucks, alone or in combination with other trucks, increase the cost of highway construction and maintenance, interfere with and limit the use of the highways for normal traffic thereon, and endanger the safety and lives of the traveling public, and that the

> regulations embodied in this Act are necessary to achieve economy in highway costs, and to permit the highways to be used freely and safely by the traveling public."

In *Hendrick* v. *Maryland*, 235 U. S. 610, this Court specifically stated that heavy vehicles are abnormally destructive of the roads upon which they are operated. In many other cases, too numerous to mention, this Court has made similar statements. That is a fact of common knowledge with which all agree. Therefore, the object of the South Carolina statute is legitimate. The grievance of those who challenge the validity of the statute is not, whether the object sought by South Carolina is legitimate or that the means used are unrelated to the object. Their contention is that the *means employed* are not reasonably necessary to attain the result sought. We say that because the object sought by South Carolina is one over which it has exclusive power and the means employed are related to it, then the efficacy of the statute is not open to inquiry. There can be no question but that restricting the weights and dimensions of heavy motor vehicles has a very definite relation to the conservation of the highways; but the appellees while not able to deny this, say, in effect, that the particular means used by South Carolina go beyond what is necessary to satisfy the object, and that as a consequence interstate commerce is burdened.

Judicial inquiry is always open to whether or not the means adopted by a legislative body are related to the object. Here, there can be no question but that they are.

The only question raised by the plaintiffs is one of degree. We say that since the means are related to the object, then the degree employed is not open to inquiry.

The oft repeated words taken from the opinion of Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316-421-423, are not inappropriate here: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the spirit and letter of the constitution, are constitutional. * * * Where the law is not prohibited and is reasonably calculated to effect any of the objects intrusted to the government, to undertake to inquire here into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretensions to such power." Of like tenor, this Court said in *Everard's Breweries* v. *Day*, 265 U. S. 545-559: "It is likewise well settled that where the means adopted by Congress are not prohibited and are calculated to effect the object intrusted to it, this Court may not inquire into the degree of necessity." In the case of *N. Y., N. H. and H. Railroad* v. *New York*, 165 U. S. 628, 629, it is said: "There may be reason to doubt the efficacy of regulations of that kind. But that was a matter for the state to determine. We know from the face of the statute that it has a real, substantial relation to an object as to which the state is competent to legislate." In the case of *Bayside Fish Co.* v. *Gentry*, 297 U. S. 422-427, the Court said: "These provisions have a reasonable

relation to the object of their enactment; namely, the conservation of the fish supply of the state, *and we cannot invalidate them because we might think, as appellant in effect urges, that they will fail or have failed of their purpose.*"

A state highway regulation which would have for its purpose the preferment of residents over non-residents, or would forbid the use of the highways as to one while permitting it as to another would be unconstitutional, both as to means and as to object. That would be a direct regulation of the business of interstate commerce. But a statute, such as the one under consideration, whose object and means are within the reserved powers of the states, and is not a regulation of the business of interstate commerce, is not rendered unconstitutional simply because it indirectly affects interstate commerce. Little, if any, interstate commerce can be carried on without being subjected to the burden of local regulations.

II.

A state may indiscriminately refuse to permit the use of its highways for the purpose of gain or condition the manner of use for such gainful purpose according to its uncontrolled judgment. Nothing in the Constitution of the United States overrides this right. The use of public highways for the purpose of gain is a privilege, not a right.

We have already stated that this case does not involve the use of highways for private purposes. It was brought

by the operators of motor trucks who use the highways for the purpose of gain.

There is a broad distinction between the two classes of persons just mentioned in so far as the right to use public highways is concerned. In the case of *Stephenson* v. *Binford,* 287 U. S. 251-264, this court said, "It is well established law the highways of the state are public property; that their primary and preferred use is for private purposes; and that their use for purposes of gain is special and extraordinary, which, generally at least, the legislature may prohibit or condition as it sees fit." In other cases, such as *Packard* v. *Banton,* 264 U. S. 140-144, and *Hodge Co.* v. *Cincinnati,* 284 U. S. 335-337, and *Frost Trucking Co.* v. *Railroad Commission,* 271 U. S. 583-592, this court has enunciated the same principle.

It is true that in the case of *Frost Trucking Co.* v. *Railroad Com., supra,* this court invalidated the action of California in requiring a private contract carrier to obtain a certificate of convenience and necessity in order to use the public highways; but this court pointed out in *Stephenson* v. *Binford, supra,* (p. 267) that the basis upon which the decision of the court hinged in the Frost case was that a private contract carrier was obliged to dedicate his property to the business of public transportation in order to avail himself of the privilege of using the highways. The carrier could not be compelled to surrender his constitutional rights of having his property dedicated to the public

service against his will in order to exercise the privilege of using the highways. No such situation is presented in the case at bar. We assert that the cases just cited sustain the power of a State to wholly exclude commercial vehicles from its highways or to condition their operation according to whatever in its judgment the state may believe will preserve its highways to their best advantage. The *Frost* case did not involve the right of California to exclude motor vehicles for the reason of the conservation of the highways. It was an arbitrary refusal to permit private persons to engage in business by attaching unconstitutional conditions upon the exercise of the privilege. It involved an illegal regulation of the right to engage in business at all. The use of the highways was only incidentally involved. The right to conserve the highways was not involved. California did not defend the suit upon those grounds. In the Stephenson case this very distinction was made of the *Frost* case. In the *Stephenson* case, the court said (p. 275), "There as we pointed out (pp. 591-592) the California act, as construed by the highest court of that state, was in no real sense a regulation of the use of the public highways. Its purpose was to protect the business of those who were common carriers in fact by controlling competitive conditions. *Protection or conservation of the highways was not involved. The condition which constrained the private contract carrier to become a common carrier, therefore, had no relation to the highways. In this view, the use of the highways fur-*

nished a purely unrelated occasion for imposing the unconstitutional condition, affording no firmer basis for that condition than would have been the case if the contract carrier were using a road in private ownership." Elsewhere we comment upon the the case of *Buck* v. *Kuykendall*, 267 U. S. 307. There much the same idea is expressed upon the action of the State of Washington in refusing to permit a common carrier to use a highway in interstate commerce. The court pointed out (p. 315) that the primary purpose of the action taken by the State "is not regulation with a view to safety or conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used."

An interstate railroad company or telegraph company desiring to use the state highways for gainful purposes, could not put their tracks or telegraph poles in public streets (1) without authorization from Congress, and (2) without paying rental therefor and submitting to the conditions laid down by local governments. Unless both of those conditions would be present a State might refuse permission. Under the authority of *Buck* v. *Kuykendall* and related cases, a State may not refuse to permit interstate commerce to enter the State for the sole reason that it is interstate commerce; but neither the *Frost* nor the *Buck* cases give any clue that a State in the interest of conservation, may not refuse to permit its highways to be

used for gainful purposes. While it is true that a State may not refuse to permit a telegraph company to enter a state under the express authority of Congress for the purpose of engaging in interstate business, still the authorities are uniform that the company can be compelled by the State to pay compensation in the nature of rent for the use of streets. (*Western Union Telegraph Co.* v. *Massachussetts,* 125 U. S. 530-548; *St. Louis* v. *Western Union Telegraph Co.,* 148 U. S. 92-102.) In the case of telegraph companies, the Act of Congress conveys no title and does not attempt to found one by delegating the power to take by eminent domain. *"It made the erection of telegraph lines free to all submitting to its conditions, as against an attempt by a State to exclude them because they were foreign corporations or because of its wish to establish a monopoly of its own."* Except in a negative sense such a statute is ony permissive, not a source of positive rights. (*Western Union Telegraph Company* v. *Richmond,* 224 U. S. 160-169.) Underlying the denial to a State of the right to refuse to permit telegraph companies from entering the state to do business is that such a company is regarded as a part of the postal service. It is in reality a branch or agency of the government for that purpose. (*Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1). Even though such companies be regarded as part of the postal service, they must submit to state regulations. The power of a state to exclude vehicles using its roads for the purpose of gain does not include, of course, the use

of highways by the government in the exercise of its powers under the Constitution, such as its war powers, the transmittal of the mail, etc.

If Congress had not provided that telegraph companies might enter upon and use post roads, they could not enter upon and use state highways for their commercial purpose; and with or without an Act of Congress, they are not at liberty to use them without paying just compensation and being subject to local regulations. A much stronger case is made out for state's rights in the case of vehicles operated for the purpose of gain. Such vehicles perform no governmental function, unless they happen to carry the mail.

The Federal Motor C[illegible] Act has not authorized them to enter upon and use state highways with whatever weight or dimension of motor truck they may want to employ, nor could it. Neither have they been authorzied to use the highways without making just compensation. All that is sought by the Federal Motor Carrier Act is to regulate the business of interstate commerce by motor vehicle. There is nothing in the Act that forbids a State from withholding the privilege of the use of its highways from all owners of commercial vehicles, residents and non-residents alike. Neither is there anything in the Act which forbids a State to provide that the weights and dimensions of motor vehicles shall be in accordance with the will of the State, giving equal treatment in that respect to both

residents and non-residents. There is nothing in the Federal Motor Carrier Act which provides that a State must permit the use of its highways by commercial vehicles. *The most that can be said of the Act is that in case a State permits such use, then Congress shall regulate, not the manner of use, but the business of the interstate carrier.*

We insist that the States have the right to have their property rights protected by this court; that those rights include the right to either refuse to permit the use of their highways for gain at all or to condition the manner of such gainful use in accordance with their own judgments. If the States are of the opinion that the interests of their residents and those of non-residents will be best served by barring the use of their highways to commercial users entirely or by regulating the manner of use by some means related thereto, that right can not be abridged until a superior power, Congress, does so in compliance with the Fifth Amendment.

III.

The statute in question is to be judged by its application to all of the highways in the state system, not by selecting a few of the strongest highways in the system and complaining that it is unfair in its application to them alone.

Most state roads are usually classified in three groups, viz: (1) City Streets, (2) Local rural roads, and (3) Statewide or through rural roads. As a general rule, city

streets are built with funds of the local community. Local rural roads are built by the respective counties with county funds. Statewide roads are built with funds from the state treasury. The bearing power or durability of city streets and local rural roads varies with wealth and topography of the particular community. Each road in the state, from the shortest and most poorly constructed dirt road to the longest and most durable highway is a component part in an elaborate state highway system. This can be truly compared with the multiplicity of veins, arteries and tiny blood vessels which go to make up the blood stream of the human body. Traffic is fed from the central arteries of traffic to the less important ones and vice versa, so that it is diffused throughout the system. As far as the main highways are concerned, a short stretch of weak pavement or a weak bridge is an embolism in the artery of commerce. A statewide highway system is no stronger than its poorest roads or the weakest links upon its most durable roads. To classify each particular highway in a state or any particular part of the highway system for vehicles weighing in proportion to the durability of the particular highway or system is just as hopelessly impractical as it would be to suspend the law against gambling in law abiding communities and to keep it in force in others. Placing a load limit of 10,000 pounds per vehicle upon a main highway and 5,000 pounds on a side road is a tacit invitation for the truck operator, the point of origin of whose load is on the side road and whose destination is the main high-

way, to carry a 10,000 pound load on both highways. If the point of origin is on the main highway and the destination is the side road, the temptation to violate the law is just as great, if not greater.

In enacting statutes, a legislature must consider that not all men are honest and law abiding; that motor vehicle laws are scorned by many and are commonly violated; that such laws are exceedingly difficult to enforce; and that there are infinitely more violators of motor vehicle laws than there are those who pay the penalty.

This court has said that there is a strong presumption that a legislature understands and correctly appreciates the needs of its own people and that its laws are directed to problems made manifest by experience. (*Middleton* v. *Texas Power and Light Co.*, 249 U. S. 152-157). That is quite pertinent in the consideration of the type of statute in question here. Legislation passed for the protection of an entire state highway system appreciates and understands the character, extent, durability and age of the roads of a state taken as a whole. It considers the topography of the country, the amount of usage of particular roads or roads in particular sections of the state and a multitude of other things regarding physical conditions. It considers the ability of its police officers to enforce the law and the probability or improbability for the law to be violated. It also considers the financial conditions of the respective communities, their ability to pay past indebtedness incurred in road construction and their ability to raise

funds for future construction and maintenance. No such legislation can exclude a single factor which we have mentioned and it will be presumed that it considered them all. These considerations crystalize themselves into law expressing the legislative judgment. Such a statute strikes a balance which must be presumed to be fair for the entire road system taken as a unit.

The object of such a statute is the protection of all the highways of a state, not just a few. Without considering the controverted factual questions in the case at bar, the validity of the statute is not to be considered in connection with the strongest and most durable highways of the state, but in connection with all of them. The means used are related to all of the highways. The inclusion of strong highways in a statute enacted to protect the weak does not invalidate the statute. A state is not bound to classify its highways, by excluding some from its operation and including others. Legislation has a right, and very often does, include innocuous things in its prohibitions in order to make its action effective.

In the case of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192-201, this court said, "It is also well established that, when a State exerting its reorganized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition, the scope of which is regarded as

essential in the legislative judgment to accomplish a purpose within the admitted power of government." In the case of *Village of Euclid* v. *Amber Realty Co.*, 272 U. S. 365, it was contended that a zoning ordinance included in its regulations and prohibitions industries which were neither dangerous nor offensive. The court said, (p. 388), "But this is no more than happens in respect of many practice forbidding laws which this court has upheld although drawn in general terms so as to include individual cases that may turn out to be innocuous in themselves. The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in terms of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the prescribed class." In sustaining the validity of a dental practice act of the State of Oregon this court said in the case of *Semler* v. *Oregon State Board*, 294 U. S. 608-613, "The legislature was entitled to consider the general effects of the practices which it described, and if these effects were injurious in facilitating unwarranted and misleading claims, to counteract them by a general rule, even though in particular instances there might be no actual deception or misstatement."

The principle to which we have referred has been sustained many times. In *Booth* v. *Illinois,* 184 U. S. 425, an Illinois statute was upheld which made it criminal to give an option to buy grain at a future time, which although it was aimed at gambling on the Board of Trade, included transactions which did not amount to gambling and were not immoral. In *Otis* v. *Parker,* 187 U. S. 606, substantially the same type of statute as in the Booth case was directed at the sale of shares of capital stock of corporations on margin. In the case of *Silz* v. *Hesterberg,* 211 U. S. 31, a New York statute prohibited the possession of certain game during the closed season. While it was a statute aimed to protect the wild game of the state, its prohibitions embraced not only domestic but imported game. It appeared that unless both domestic and foreign game were included, dealers in game might easily sell birds of a domestic kind under the claim that they were taken in another state. In *Pierce Oil Co.* v. *City of Hope,* 248 U. S. 498, an ordinance was sustained which forbade the sale of gasoline within 300 feet of any dwelling house. The court said, (p. 500), "If it were true that the necessarily general form of the law embraced some innocent objects, that of itself would not be broad enough to invalidate it to remove such an object from its grasp."

Even if the means employed by the South Carolina statute had no relation to the object as applied to a part of roads in the state system, their inclusion in the statute would not defeat its validity. Excluding such roads from

the statute would only bring about the opportunity to violate the law upon the highways included. The inclusion of the strong highways with the weak is necessary to protect the latter. The legislature was not bound to sacrifice its city streets and local rural roads in order to promote the operation of heavy vehicles upon its main highways. It was not required to heap maintenance and construction costs upon local governmental units in the repair of local roads. It was not required to increase its police force or rely upon the honesty of the motor vehicle operator not to violate the law. It was not required to adopt an intricate system of highway classifications, fixing different limitations as to each highway or bridge in the state according to its capacity. It had a right to, and did, adopt a statute which would produce the greatest good for the greatest number.

IV.

The sole and exclusive power to regulate the manner of use of state highways by vehicles operated for the purpose of gain is in the states. Congress has no authority in such a field. In the case at bar, the jurisdiction of the court below must depend upon whether or not the Commerce Clause invested Congress with jurisdiction in such a field. If it did not, then the court was without jurisdiction.

The power of the States to regulate their purely internal affairs has never been surrendered to Congress.

(*New York* v. *Miln*, 11 Pet. 102-139; *Slaughter House Cases*, 16 Wall. 36-63.) A regulation by Congress of the internal commerce of a state is void. (*U. S.* v. *Dewitt*, 9 Wallace 41.) State power to impose restraints and burdens upon persons and property in conservation and promotion of public health, good order and prosperity is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the Constitution, and essentially exclusive. (*In Re Rahrer*, 140 U. S. 545-554.) It is well established that an abridgment of rights by a State, unless it comes in conflict with the constitution or a law of the United States, is an affair between the State and its citizens, of which this court can take no cognizance. (*Transporation Co.* v. *Chicago*, 99 U. S. 635-643.)

The Commerce Clause is a delegation of power from the States to Congress to regulate. It follows, therefore, that if Congress would have no power to regulate the weights and dimensions of motor vehicles using state roads, then such power is reserved in the States; and the judicial branch of the National government would have no authority to prevent state regulation in a field over which Congress has no control.

(1) The South Carolina statute does not discriminate against non-residents in favor of residents. It treats all alike.

(2) The statute places no restrictions upon the interstate use of the highways by either residents or non-residents who may desire to use them. The limitations of the statute are more than ample for such use. The statute is aimed at the use of highways by heavy all commercial vehicles operated for the purpose of gain. The use of public highways for the purpose of gain is an extraordinary one which may be granted or withheld by a State. It is a privilege, not a right as in the case of a non-profit use. No burden is placed upon the interstate use of the highways by citizens of the several states, who may desire to use them for non-profit purposes as of right. The regulation falls upon those who exercise a privilege; and it operates upon them equally and without discrimination. It does not operate against the assertion of a right.

(3) The statute does not forbid or curtail either residents or non-residents to enter or leave the state for the purpose of transacting ordinary business within the state or in interstate commerce. They are free to do so. The import or export of goods is not forbidden or curtailed.

(4) No complaint is made as to the imposition of taxes or license or inspection fees.

We contend that the States alone have power to grant or withhold the privilege of using their highways for the purpose of gain or to condition the manner of use for such purpose however they see fit, provided that such conditions do not discriminate among those of that class or between

citizens of the several states and accord equal privileges to all. Since no discriminations are practiced and residents and non-residents are accorded equal privileges, the jurisdiction of the court below must stand or fall solely upon whether or not the regulation of the manner of use of the highways by vehicles operating for the purpose of gain was a field in which Congress might enter. If it were such a field, then no state could burden the operation of such vehicles in interstate commerce by that type of regulation. On the other hand, if the sole and exclusive power is in the state, and the field is one in which Congress may not enter, then in the absence of discriminatory action and with the accordance of equal privileges, the States are free to regulate in whatever manner they see fit. Therefore, the question with which we shall hereinafter concern ourselves is whether or not and under what conditions Congress might enter such a field. Merely because a State regulation may incidentially effect interstate commerce does not suffice to give Congress jurisdiction if the field is the internal affairs of the States. State legislation, limited to internal commerce, which does not include the subjects of interstate commerce is not invalid because it may affect the latter indirectly. (*The Minnesota Rate Cases*, 230 U. S. 352-410.) (*Schechter Corp.* v. *U. S.*, 495-546). The subject matter for congressional action must be one of interstate commerce. The manner of use of a state road does not fall within such subject matter.

It may be stated as a general proposition that all cases sustaining the jurisdiction of this court to prevent the enforcement of state regulation under the authority of the Commerce Clause may be classified as follows:

(1) Cases where the jurisdiction of Congress is immediately exclusive; that is, exclusive without any action taken on the part of Congress.

(2) Cases in which Congress has already entered the field.

(3) Cases in which (a) the jurisdiction of Congress is not immediately exclusive, and (b) Congress has not yet entered the field, but the regulations of the State are burdensome.

It is to be noted that in each of the three foregoing classes of cases the jurisdiction of this court is made to depend upon the jurisdiction of Congress. If the jurisdiction of Congress is lacking, then the subject matter is not one of interstate commerce in which this court may intervene. This is dramatically illustrated by a comparison of *U. S.* v. *Dewitt*, 9 Wallace 41, with *Minnesota* v. *Barber*, 136 U. S. 313. In the latter case a Minnesota statute forbade the sale of meat within the state unless it was inspected by state authorities. As applied to meat shipped into the state from without, it was a subject matter of interstate commerce, over which Congress had control, thus giving this court jurisdiction to enjoin state action. In the *Dewitt* case, this court held an Act of Congress invalid

which forbade the sale of illuminating oils. There this court said, (p. 43-44), "That Congress has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes, the Constitution expressly declares. *But this express grant of power to regulate commerce among the States has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States.*"

In *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, it was pointed out (p. 701) that it is Congress and not the Judicial Department to which the Constitution has given the power to regulate commerce; that there are cases where the courts will interpose to prevent state action where Congress has not yet acted; but those are cases where states have interfered with the freedom of interstate commerce and the non-action or silence of Congress is an indication of its will that no such restraint shall be imposed. In view of the *Parkersburg* case and other cases, we say that the jurisdiction of this Court in matters of interstate commerce is co-extensive with the jurisdiction of Congress.

V.

The power of Congress over state roads consists only in the power to regulate the business of interstate commerce, per se, not the power to displace the local police power having for its purpose the conservation of state property. The latter is not a regulation of the business of interstate commerce.

The regulation of the business of interstate commerce is one thing. State regulations which are aimed to conserve state property and may incidentally affect interstate commerce are quite another. The former is under the control of Congress. The latter has never been surrendered to the central government, but is in the states.

Without doubt, regulations of the dimensions and weights of motor vehicles do affect interstate commerce; but they only affect interstate commerce in the same way in which state laws punishing the crime of murder may affect those who happen to be engaged in interstate commerce at the time of the commission of such an offense.

This Court has repeatedly held that the Commerce Clause has no application to state statutes having for their aim the conservation and protection of state property. In *Geer* v. *Connecticut*, 161 U. S. 519, a statute of Connecticut was upheld which prohibited the exportation of wild game from the state upon the theory that wild game are the property of the state, and the state has the inherent power to provide for their conservation. The same principle was approved in *Ward* v. *Race Horse*, 163 U. S. 504; in *Silz* v. *Hesterberg*, 211 U. S. 31, and *Carey* v. *South Dakota*, 250 U. S. 118. The inherent power of a state to preserve its natural resources was given additional sanction in *Hudson Water Co.* v. *McCarter*, 209 U. S. 349. This same doctrine was recently approved. (*Bayside Fish Co.* v. *Gentry*, 297 U. S. 422-427.)

Two well considered District Court decisions nullified the first Federal Migratory Bird Act upon the theory that the Commerce Clause gave no authority to Congress to regulate the property of the states. (*U. S.* v. *Shauver*, 214 Fed. 154; *U. S.* v. *McCullogh*, 221 Fed. 288.) The second Migratory Bird Act, which was enacted under the treaty making power of Congress, was upheld by this Court upon the theory that such power transcends all state action. (*Missouri* v. *Holland*, 252 U. S. 416.) Such Act was not sustained under the Commerce Clause. The case of *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229, is not contra to the previous cases upholding the right of the states to preserve their natural resources. That decision nullified an Oklahoma statute having to do with the exportation of natural gas from the state; but the Court carefully distinguished between the inherent power of a state to protect its own property by prohibiting the exportation of natural resources which are its property, such as wild game, as distinguished from such property as natural gas, which is the property of the surface proprietors and not that of the state. It is our position that the Oklahoma case is an authority confirming the power of a state to protect its property, without being fettered by the Commerce Clause.

It is true that a state road is not a natural resource. It is an artificial structure. But it is state property, built and maintained by the state in discharge of one of its great-

est sovereign powers, that of providing its citizens with means of transportation and communication. The essence of *Oklahoma* v. *Kansas Natural Gas Company, supra,* and the other cases just cited is that it is the property right or right of ownership of a state which gives the state immunity from the Commerce Clause. Consequently, a state road comes within the same category as any other property of a state.

Elsewhere we refer to Justice Taney's pronouncement regarding the power of a state to regulate its own highways (*Searight* v. *Stokes,* 44 U. S. 150-170). A more comprehensive discussion of the same subject by Justice Bradley is to be found in the case of *Railroad Company* v. *Maryland,* 88 U. S. 456. Permit is to pause a moment to quote a sentence from Justice Bradley's opinion in the latter case which is quite pertinent at this point: "This unlimited right of the State to charge, or to authorize others to charge, toll, freight or fare for transportation on its roads, canals and railroads, *arises from the simple fact that they are its own works, or constructed under its authority. It gives them being.*"

The power of a state to own, maintain and conserve its property for a public purpose, be it a statehouse, a penitentiary or a road is a sovereign power. Without such power, there could be no sovereignty. The decisions of this court previously alluded to indicate that the Commerce Clause does not in any way take from or limit this power. For

that reason, when a state builds a road, which may be traversed by interstate commerce, it does not dedicate the road for regulation by Congress under the Commerce Clause. That power of regulation is in the state.

VI.

A regulation by the Federal government of the power to control the conservation of the highways of a state would not be a regulation of the business of interstate commerce. It would be a taking of property for a public use without compensation in violation of the Fifth Amendment to the Constitution of the United States.

Assume that state roads were so much unoccupied state lands. Could the Federal government build roads across those unoccupied lands without making compensation to the state as required by the Fifth Amendment? If the answer is "no", then what difference does it make if the state lands are occupied by a slab of concrete or a covering of gravel and are used as roads? There are thousands of miles of unimproved rural dirt roads in this country which, save for a small amount of grading, are in a state of nature. From a physical standpoint they are in much the same condition as an equal amount of state-owned land used for farming or reserved for future public use. Could it be possible that the Federal government could seize either a state farm or a dirt road for the purpose of building its own highway without making the state whole? It is obvious that the answer does not lie in the character

of the property. A state has as much a property right in a road as it has in a farm or a state house. The questions to be considered are (1) whether or not the Fifth Amendment requires that the United States must compensate a state before taking one of its highways and (2) whether or not a regulation by Congress of the nature under consideration here constitutes a taking within the inhibition of the Fifth Amendment.

(1)

In regard to whether or not the Fifth Amendment requires compensation to be made by the United States for the taking of a state highway, the question has been definitely settled in the affirmative by this court. (*St. Louis* v. *Western Union Co.*, 148 U. S. 92). There a telegraph company had attacked the constitutionality of an ordinance which exacted a charge of five dollars a pole for the use of city streets. The court upheld the ordinance. In delivering the opinion of the court, Justice Brewer said the following (p. 100):

> "It is a misconception, however, to suppose that the franchise or privilege granted by the act of 1866 carries with it the unrestricted right to appropriate the public property of a State. It is like any other franchise, to be exercised in subordination to public as to private rights. While a grant upon one government may supersede and abridge franchises and rights held at the will of its grantor, it cannot abridge any property rights of a public character created by the authority of another sovereignty. No one would suppose that a franchise from the Federal government to a corporation, State or national, to construct interstate roads or lines of travel, transportation or communica-

tion, would authorize it to enter upon the private property of an individual, and appropriate it without compensation. No matter how broad and comprehensive might be the terms in which the franchise was granted, it would be confessedly subordinate to the right of the individual not to be deprived of his property without just compensation. And the principle is the same when, under the grant of a franchise from the national government, a corporation assumes to enter upon property of a public nature belonging to a State. It would not be claimed, for instance, that under a franchise from Congress to construct and operate an interstate railroad the grantee thereof could enter upon the state-house grounds of the State, and construct its depot there, without paying the value of the property thus appropriated. Although the state-house grounds be property devoted to public uses, it is property devoted to the public uses of the State, and property whose ownership and control are in the State, and it is not within the competency of the national government to dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any of its corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are the public property of the State. *While for purposes of travel and common use they are open to the citizens of every State alike, and no State can by such common use, yet when an appropriation of any part of this public property to an exclusive use is sought, whether by a citizen or corporation of the same or another state or a corporation of the national government, it is within the competency of the State, representing the sovereignty of that local public, to exact for its benefit compensation for this exclusive appropriation.* It matters not for what the exclusive appropriation is taken, whether for steam railroads or street railroads, telegraphs or telephones, the State may if it chooses exact from the party or corporation given such exclusive use pecuniary compensation to the general public for being deprived of the common use of the portion thus appropriated."

In *Western Union Telegraph Co.* v. *Richmond*, 224 U.S. 160-169, the court said, "The inability of the State to prohibit the appellant from getting a foothold within its territory, both because of the statute and of its carrying on of Commerce among the states, gives the appellant no right to use the soil of the streets, even though post roads, as against private owners or as against the city or state where it owns the land."

The principle of law enunciated by the court in the cases just cited is not a far cry from the statement of Justice Taney in the case of *Searight* v. *Stokes*, 44 U. S. 150-170. There it appeared that the Cumberland Road had been ceded to Pennsylvania by the United States upon the proviso that vehicles carrying the United States mails should be permitted to use the road free from tolls. The court was called upon the determine whether or not such proviso should apply to a private contract hauler who, in addition to carrying the mails, transported passengers and baggage. The court held that such private party came within the proviso. In considering the case, Justice Taney said the following:

> "* * * * If the state had made this road herself, and had not entered into any compact upon the subject with the United States, she might undoubtedly have erected toll-gates thereon, and if the United States afterwards adopted it as a post-road, the carriages engaged in their service in transporting the mail, or otherwise, would have been liable to pay the same charges that were imposed by the state on other vehicles of the same kind. And as any rights which the United States might be supposed to have acquired

in this road have been surrendered to the state, the power of the later is as extensive in collecting toll as if the road had been made by herself, except in so far as she is restricted by her compact; and that compact does nothing more than exempt the carriages laden with the property of the United States, and the persons and baggage of those who are engaged in their service. Toll may therefore be imposed upon every thing else in any manner passing over the road; restricting, however, the application of the money collected to the repair of the road, and to the salaries and compensation of the persons employed by the State in that duty."

It is apparent, from what has just been quoted that the court considered the property right of the State of Pennsylvania in its roads was of such magnitude that it is beyond the power of the Federal government to use them without paying compensation. It is quite possible that the states have surrendered the right to collect tolls from the national government by the acceptance of the benefits of the Federal Highway Acts of 1916 and 1921. (See Point X of Argument.) However, no other right of the States in their roads has been surrendered.

That the Fifth Amendment is a limit upon Congress in the exercise of its authority under the Commerce Clause, there can be no doubt. (*Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312-336.) In that case, Justice Brewer said, "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, we have heretofore quoted. Congress has supreme control over the

regulation of commerce, but if, in exercising that supreme control, it deems it necessary to take private property, then it must proceed subject to the limitations imposed by this Fifth Amendment, and can take only on payment of just compensation. The power to regulate commerce is not given in any broader terms than that to establish post-offices and post-roads; but, if Congress wishes to take private property upon which to build a post-office, it must either agree upon the price with the owner, or in condemnation pay just compensation therefor. And if that property be improved under authority of a charter granted by the State, with a franchise to take tolls for the use of the improvement, in order to determine the just compensation, such franchise must be taken into account. Because Congress has power to take the property, it does not follow that it may destroy the franchise without compensation. Whatever be the true value of that which it takes from the individual owner must be paid to him, before it can be said that just compensation for the property has been made. And that which is true in respect to a condemnation of property for a post-office is equally true when condemnation is sought for the purpose of improving a natural highway. Suppose, in the improvement of a navigable stream, it was deemed essential to construct a canal with locks, in order to pass around rapids or falls. Of the power of Congress to condemn whatever land may be necessary for such canal, there can be no question; and of the equal necessity of paying full compensation for all private property

taken there can be as little doubt. If a man's house must be taken, that must be paid for; and, if the property is held and improved under a franchise from the State, with power to take tolls, that franchise must be paid for, because it is a substantial element in the value of the property taken. So, coming to the case before us, while the power of Congress to take this property is unquestionable, yet the power to take is subject to the constitutional limitation of just compensation. It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the government, in the exercise of its sovereign power, takes the property."

Not only is the Fifth Amendment a limit upon the power of Congress over interstate commerce, but over other great powers given by the Constitution, such as the bankruptcy power (*Louisville Bank* v. *Radford,* 295 U. S. 555-589) and the power to tax (*Heiner* v. *Donnan,* 285 U. S. 312-326).

(2)

The next question regards whether or not the regulation in question of a state road by Congress would amount to a taking within the inhibition of the Fifth Amendment. In other words, we maintain that a basic regulation by

Congress of the manner of use of state property would violate the very letter and spirit of the Fifth Amendment.

Elsewhere we argue that a regulation of the nature we are considering is not *per se* a regulation of interstate commerce; but that such a regulation by Congress would deprive a state of the power to conserve its own property. We insist that such a situation would result in a taking of property. Virtually all courts of last resort agree that the term "property" as used in constitutional provisions requiring compensation for taking private property includes not only the tangible subject matter or corpus, but also every right which accompanies ownership, such as the right to use and exercise full dominion over the property. The rule is well stated in the case of *Scott* v. *Manhattan Ry. Co.*, 17 N. Y. S. 364-365, where it is said: "As the value of property results wholly from its use, it follows that to deprive the owner of its most advantageous use is a deprivation of property. Indeed, all that is beneficial in property arises from its use, and the fruits of that use; and whatever deprives a person of them deprives him of all that is desirable or valuable in the title or possession; and whatever limits or interferes with the most advantageous use of the property does a substantial injury to the title and possession, which is not compensated by nominal damages." In the case of *Old Colony and Fall River R. R. Co.* v. *County of Plymouth*, 14 Gray, 155-161, Chief Justice Shaw said: "The word 'property' in the tenth article of

the Bill of Rights, which provides that 'whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor' should have such a liberal construction as to include every valuable interest which can be enjoyed as property and recognized as such." The Supreme Court of Illinois expressed the rule succinctly in the case of *Bailey* v. *People*, 190 Ill. 28-33, where it is said: "The term property includes every interest any one may have in any and everything that is the subject of ownership by man, together with the right to freely possess, use, enjoy and dispose of the same." In the case of *Pumpelly* v. *Green Bay Company*, 80 U. S. 166-177, Justice Miller said: "It would be a very curious and unsatisfactory result if, in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for a public use. Such a construction would pervert the

constitutional provision into a restriction upon the rights of the citizen, as those rights stood at common law, instead of the government; and make it an authority for the invasion of private rights under the pretext of public good, which had no warrant in the law or practices of our ancestors."

The situation in the case at bar has no analogy whatsoever to the decisions of this Court upholding statutes outlawing the use of intoxicating liquor, even though it might have been lawfully acquired or owned prior to the passage of the statute. (*Samuels* v. *McCurdy*, 267 U. S. 188; *Crane* v. *Campbell*, 245 U. S. 304.) Those statutes were upheld upon the ground that the evils attendant upon the use of intoxicating liquor are such that the state has the absolute power to prohibit their sale or possession in the interest of the welfare of its citizens; but no court has ever taken it upon itself to permit the seizure or use by the sovereign of private property which has no inherent qualities of evil requiring its confiscation. Such a rule of law would violate the very foundations of democratic government.

As far as the Fifth Amendment is concerned, could there be any difference between the United States entering upon and building a road upon unoccupied state land without making compensation therefor and the United States fixing regulations for the use of state land occupied as a public road? Since the right of property includes the right

to manage it and exercise dominion and control over it, where does any right of property remain if a non-owner arrogates to himself the power to manage and control it? Is property any the less taken if the right of control is taken from the owner than if it is seized in its entirety by an intruder? If the right of control vanishes, where does the right of property remain?

It is hornbook law that the right of ownership of private property is subject to reasonable local police regulations, such as building ordinances, restrictions upon the sale of intoxicating liquor, zoning laws and the like; but beyond that point, governmental control over property amounts to a taking for a public use. Wherein lies the point at which police regulations over private property end and the taking for a public use begins? There is a vast difference between an incidental injury to private property resulting from the exercise of proper police regulations and the taking of property by the sovereign for a public use without paying compensation as required by the constitution.

The distinction is apparent between a governmental interference with property rights (1) as the result of the exercise of police powers and (2) where there is a taking and using for a public use. The object sought in each case is different, although there may be an interference with the use in both instances. In the first case, the interference is not primarily for a special use by the public but is for

the protection of the health, morals and general welfare of the citizens. In the case of a reasonable exercise of police power to attain that end, the property owner must submit. In the second case the end sought is primarily the special use of private property for a public purpose. The public is to use the property. The property taken has no inherent qualities which require regulation for good order or for the protection of society. This distinction was well put by the Court of Claims in the case of *Heflebower* v. *U. S.*, 21 Ct. Cl. Reports 228-237, where it is said: "But there is a distinction to be drawn between property used for government purposes and property destroyed for the public safety. If the conditions admitted of the property being acquired by contract and of being used for the benefit of the government, the obligation attaches, and must be regarded as acquired under an implied contract; but if the taking, using or occupying was in the nature of destruction for the general welfare or incident to the inevitable ravages of war, such as the march of troops, the conflict of armies, the destruction of supplies, and whether brought about by casualty or authority, and whether on hostile or national territory, the loss in the absence of positive legislation, must be borne on whom it falls, and no obligation to pay can be imputed to the government." Further expression of the same thought is to be found in *1 Lewis on Eminent Domain, Sec. 6, 1909 Ed.*, where the author says: "But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his prop-

erty, or of some substantial interest therein, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power."

This Court has held that where the government floods lands belonging to a private owner, there is a taking within the scope of the Fifth Amendment; that while the title may not be appropriated, yet such an invasion takes away the use of property so that it is of little consequence in whom the fee may vest. (*U. S.* v. *Lynah*, 188 U. S. 445.)

In *Vol. 4, McQuillen on Municipal Corporations (2nd Ed.), Sec. 1589*, the author says: "The question of what constitutes a 'taking' of property within the meaning of such constitutional provisions has been the subject of many decisions, and in connection therewith the question of what is 'property' has been necessarily involved. The law as to what constitutes a taking has undergone a radical change during the last few years. Formerly it was limited to the actual physical appropriation of property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property, and his property may be taken in the constitutional sense, though his title and possession remain undisturbed; and it may be laid down as a general proposition, based upon the nature of property itself, that, whenever the law-

ful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, *pro tanto,* taken, and he is entitled to compensation."

There is a marked difference between a police regulation, such as a zoning ordinance, which only requires the owner of property to submit to restrictions *in his own use of his own property,* and a governmental fiat requiring the owner of property to suffer restrictions to be placed upon his property, *not for his own use, but for a special use by others.*

Police regulations which are reasonable and which do not require the owner to turn over his property to the public for a special use do not amount to taking of property in the constitutional sense of the term. Property is not taken when the owner enjoys its exclusive use, even though he may be restricted in the enjoyment of it. On the other hand, when the owner is forbidden to regulate the use which the public may make of his property, a taking occurs *for the reason that there occurs a burden of public servitude upon the property.*

It is the subjection of private property to a public servitude that marks it as a taking of property for a public use. For example, this Court has held that where the War Department fired its guns so that the shells would cross in the air over private property, the property was subject

to such a servitude as to constitute a taking within the meaning of the Fifth Amendment. (*Peabody* v. *United States*, 231 U. S. 530.)

In *Cooley's Constitutional Limitations (1927 Ed.), pp. 1109-1110,* the learned author defines eminent domain as follows: "The right itself is generally defined as if it were restricted to such cases, and is said to be that superior right of property pertaining to the sovereignty by which the private property acquired by its citizens under its protection may be taken *or its use controlled for the public benefit without regard to the wishes of the owner.*"

The point we desire to make clear is that any Act of Congress which would permit the use of state roads by persons engaged in interstate commerce with any type of vehicle which Congress would consent to be used without regard to the wishes of the owner (the States) would not be a mere regulation of the business of interstate commerce. *Such action would compel the States to permit a special use of their lands against their will by third persons.* Requiring the states to submit the use of their property to third persons against their will would bring the action of Congress squarely within Mr. Cooley's definition of what is an exercise of the power of eminent domain, *"its use controlled for the public benefit without regard to the wishes of the owner."* That would be compulsory dedication of property for the unbridled use of those who had no interest or right of ownership in it whatever. The

property would pass from the domain of the States to the domain of the United States through eminent domain without compliance with the Fifth Amendment.

The manufacturer who ships his goods in interstate commerce, though submitting to the regulation by Congress in the use of his property, is not required to permit the general public to make a special use of his property. Regulations of such a nature by Congress do not amount to an exercise of the power of eminent domain. On the other hand, regulations by Congress which would compel private property itself to be dedicated for a special public use; regulations which would require private property to submit to a public servitude for a use by other than the owner without compensation pass from the realm of legitimate regulations to that of the unlawful exercise of the power of eminent domain.

In case Congress would take from the states the power to regulate traffic upon their highways what rights would the states have in the residue? We submit that, save for the right to collect taxes, the naked power of ownership alone would remain. Because of their peculiar nature, roads can only be used for the bearing of traffic, nothing else. When the power to regulate traffic is gone all power of management or control departs with it. Taking from the states the power to regulate traffic upon their roads strikes at the very heart of ownership. That is a taking of property. Such action upon the part of Congress would deprive

the States of the exclusive use of their property and devote it to the service of the national government against their will.

In the case of *Oklahoma* v. *Kansas Natural Gas Co.*, 221 U. S. 229, this court held a state statute invalid which prevented the owner of natural gas from exporting it from the state. The court said, (p. 254), "It does not protect the rights of all surface owners against the abuses of any. It does not alone regulate the right of reduction to possession of the gas, but when the right is exercised, when the gas becomes property, takes from it the attributes of property, the right to dispose of it; indeed, selects its market to reserve it for future purchasers and use within the state on the ground that the welfare of the state will thereby be subserved. * * * Gas, when reduced to possession, is a commodity; it belongs to the owner, and, when reduced to possession, is his individual property, subject to sale by him * * *."

A clear statement is to be found in the case *In Re Jacobs*, 98 N. Y. 98-105, where it is said, "The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use. Property may be destroyed or its value annihilated; it is owned and enjoyed for some useful purpose and it has no value unless it can be used. Its capability for enjoyment and adaptability to some use are essential characteristics and attributes without which property cannot be conceived;

and hence any law which destroys it or its value, or takes away any of its essential attributes, deprives the owner of his property."

The regulation of traffic by Congress upon the roadways of a state would amount to the nationalization of state property without the consent of the states. A state has no authority to convert a private enterprise into a public utility under the guise of its police powers. (*Producers Transportation Co.* v. *R. R. Co.*, 251 U. S. 228-230; *Michigan Commission* v. *Duke*, 266 U. S. 570-578.) In the Producers Transportation Company case, the court said, "The State could not by mere legislative fiat or by any regulating order of a commission convert it into a public utility or make its owner a common carrier; *for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment.*" By the same token we say that Congress has no power to nationalize state roads against the will of the states without making compensation therefor as required by the Fifth Amendment. If the ordinary police powers of a state do not permit private property to be converted into a public utility—if that is a taking of property without making compensation in violation of the Constitution, then what is to be said about an Act of Congress which would convert state roads into national highways by taking the regulatory powers of the states away from them and vesting them in Congress?

Since it is clear that the Fifth Amendment protects the states just as much as it does private parties from seizure of their property by the United States, and that the deprivation of the owner of property of his right to manage and regulate its use is a taking of property just as much as if the owner were physically ousted from possession, then we maintain that the Fifth Amendment is a limitation upon the power of Congress to control the traffic upon state roads.

If, as Justice Bradley said, in *St. Louis* v. *Western Union Telegraph Co., supra,* Congress is without power to permit a telegraph company to use city streets with its poles without making compensation, then what authority has Congress to permit an unbridled use of traffic upon those same streets? The only difference is in the character of use. If the power of regulation of traffic is in Congress and Congress should elect to act under that power, then the power of Congress is subject to no restraints. Its power under the Commerce Clause knows no limits, save those fixed by the Constitution itself.

If the Fifth Amendment is not a bar to Congress, what is there in the Constitution to prevent Congress from removing all restraints upon traffic? If the states have dedicated their highways to Congress for the purpose of regulation under the Commerce Clause, what restraint upon Congress remains? It is undeniable that if the power to regulate the weights of motor vehicles is exclusively in the

states, then the people of the states, speaking through their legislative representatives, might choose to remove all restrictions so that the rapid destruction of the highways would follow. If, on the other hand, such power is in Congress when it chooses to act, then it too might lift all restrictions with the resulting loss of millions of dollars of property paid for by the people of the respective states. Thus, it is seen that the use of public roads, whether by a telegraph company by the occupancy of poles, or by the unbridled use of traffic, while differing in kind, might both arrive at the same result, a complete eviction of the state from its property, unless we say that the bar of the Fifth Amendment is as full in the one case as it is in the other.

VII.

In maintaining and owning roads the states are not engaged in interstate commerce.

True it is that when Congress regulates *the business of interstate commerce,* private property rights must yield to a reasonable exercise by Congress of its powers under the Commerce Clause. The railroad company must submit to a multitude of regulations which in each instance interferes with the management and control of its property. The same applies to a common carrier by motor vehicle who elects to cross state lines. The manufacturer who would ship his products in interstate commerce must also yield.

What is there, then, that sets the states apart in the regulation of their roads so that they are immune from the Congressional action?

The states are not engaged in the business of interstate commerce. Except in certain extraordinary cases, they can cross no state lines to exercise their sovereign powers elsewhere. Their exercise of sovereignty is ordinarily limited to their own confines. They build their highways in their sovereign capacities in discharge of their duties to their own citizens. Their highways do not cross state lines. They do not maintain highways in other states. The only connection the highways of the states have with interstate commerce is that they may be used by vehicles passing from one state to another. One of the inherent powers of sovereignty is to exercise police powers for the protection of sovereign property. This power is as inherent as the power to tax. Congressional powers cannot subordinate this indispensable power of sovereignty without taking the property of the states. When the power of the sovereign to control its property goes, its property rights follow. Its sovereignty is gone. There cannot be two rights of sovereignty in the same property, one state and the other Federal. The power of conservation cannot exist in both governments at the same time. It is inconceivable how the property of a state, not used by the state in the business of interstate commerce, never dedicated by the state to the use of interstate commerce, built within the

confines of the state and used, not by the state, but by third parties, as an incident to the passage of vehicles in interstate commerce, can be controlled by Congress without the exercise of the power of eminent domain. Such Congressional action would not be the regulation of interstate commerce. It would be the control by Congress of state property, a management of sovereign property other than its own; a government of property, not a management of interstate commerce; a superintendent of state assets not used by the states in interstate commerce; *the foisting of the same Federal management upon state property as Congress may assert upon commercial enterprise as the price the latter must pay for the privilege of engaging in commerce between the states.* It would be an exclusive exercise of power by Congress in which the states might not interfere. The exercise of control by one sovereign excludes control by the other. As Justice McLean expressed it in The Passenger cases, (7 Howard 282-398): "A concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is impracticable in action. It involves a moral and physical impossibility. - - - - If the powers be equal, as must be the case, both being sovereign, one may undo what the other does, and this must be the result of their action."

The management and control of public property is government. Without this, there could be no government. Without it, the States could not be sovereign.

While it is true that the Commerce Clause extends to every instrumentality used by one engaged in interstate commerce, provided that the instrumentality is under the ownership or control of the person engaged in interstate commerce, it by no means extends to instrumentalities owned or controlled by those not engaged in interstate commerce. There is a wide difference between instrumentalities of interstate commerce which are owned and employed by operators engaged in interstate commerce, and instrumentalities of interstate commerce used by such operators, but not owned or controlled by them. That was the effect of the cases of *Detroit International Bridge Co.* v. *Corporation Tax Appeal Board*, 294 U. S. 83-86, and *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150-153.

The first named case involved the power of the State of Michigan to assess a privilege tax upon a toll bridge corporation which maintained a bridge between this country and Canada. The opinion of the court discloses that the bridge corporation collected tolls from vehicles and pedestrians crossing its structure, but that it operated no vehicles. Upon the authority of the case of *Henderson Bridge Co.* v. *Kentucky, supra,* the court held that the bridge corporation was not engaged in interstate commerce. The case of *Henderson Bridge Company* v. *Kentucky* involved the power of the State of Kentucky to include franchises that state had granted to the corporation in determining the valuation of the company's property for taxation. The court said, (p. 153):

> "The company was chartered by the State of Kentucky and the state could properly include the franchises it had granted in the valuation of the company's property for taxation. * * * The regulation of tolls for transportation over the bridge considered in *Covington and Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204, presented an entirely different question. Clearly the tax was not a tax on interstate business carried on over or by means of the bridge, *because the bridge company did not transact such business. That business was carried on by the persons or corporations which paid the bridge company tolls for the privilege of using the bridge.*"

It is to be observed from these cases that the *res* or instrumentality incidentally used in interstate commerce was not owned or controlled by the persons who were engaged in carrying on interstate commerce. The bridge corporations did not transact the business of interstate commerce although they owned instrumentalities capable of such use by others.

Substantially the same thought underlies the decisions of this court in connection with the control of Congress over the intrastate activities of railroad companies. We refer to some of those cases elsewhere. However, we shall refer to a few of them here to illustrate our point.

The power of Congress is supreme in the following cases:

When state authorities seek to compel the erection of a union state so expensive as to deplete the financial resources of the railroad, *Railroad Commission* v. *South. Pac. Co.*, 264 U. S. 331; when a railroad seeks to construct an

intrastate branch line which will deplete its own financial resources or those of another interstate carrier, *Texas & Pac. Ry. Co.* v. *Gulf etc. Ry. Co.*, 270 U. S. 266; the issuance of securities by a railroad company, *Venner* v. *Michigan Cent. R. R. Co.*, 271 U. S. 127.

In all of those cases the intrastate instrumentality over which the control of Congress was exercised was but a unit in an interstate system; and the unit was under the control or ownership of the interstate system.

No case has ever been brought to our attention where an instrumentality or commerce not owned or controlled by one engaged in interstate commerce has been held to be an instrumentality of interstate commerce. The situation in the case of state-owned roads is strikingly similar to that of the bridge cases just referred to. It is unlike that of the railroad cases.

The case of a state-owned railroad is to be sharply distinguished. Such a railroad if engaged in interstate commerce is subject to control by Congress. (*U. S.* v. *California*, 297 U. S. 175.) In that case the railroad had track connections with an interstate line and linked that and three other interstate lines with yards in San Francisco. It received and transported freight by its own engines, and hauled freight and cars offered it by railroads, steamship companies and industrial plants for a flat charge per car. It is important to note that the railroad was engaged in the business of hauling freight for interstate lines.

VIII.

In so far as interstate commerce is concerned, there is no analogy between the states in the ownership of their roads and railroad companies and other commercial enterprises engaged in business of an interstate character.

No analogy is furnished in the case of governmental regulation of public utility companies unless it can be said that by building a road a state dedicates it for the use of the United States. That which gives the inherent power of government to regulate public utitlities is that a public utility company by devoting its business to the public use, grants the public an interest in that use to the extent of that interest, and must submit to be controlled by the public for the common good to the extent of the interest it has thus created. (*Munn* v. *Illinois*, 94 U. S. 113-126; *Wolff* v. *Industrial Court*, 262 U. S. 522-535.) In the case of one who seeks to engage in an interstate business, he must submit to the power of Congress under the Commerce Clause to regulate interstate business so that no analogy is furnished there. Submitting to the control of Congress over interstate commerce is a prerequisite to the right to engage in an interstate business.

The interstate railroad company or the manufacturer who ships his goods in interstate commerce must submit to the control of Congress as the price for the privilege of engaging in interstate commerce. Cases of this Court upon the subject matter of those two groups clearly have no

application to the right of a state not engaged in interstate commerce to insist upon the right to say how it shall preserve its property. The business of operating a railroad and all of its ramifications are so clearly subjects of interstate commerce within the sphere of Congressional action that but little comment need be required to distinguish such a situation from that of state owned roads. The railroad is a public utility. It dedicates its property to the public service and to the control of Congress in engaging in the business of interstate commerce. It is a corporation organized for pecuniary profit. Its roadbed may extend from state to state. Its primary object is for the carrying on of commerce intrastate and interstate. It ships goods and carries passengers. The state is not a public utility. It does not dedicate its property to the use of Congress. It does not engage in the business of interstate commerce. It does not ship goods or carry passengers from state to state. It does not engage in private commercial enterprise. Its roads are held in its sovereign capacity. Its roads are not designed for the purpose of carrying on interstate commerce by the state. The mere fact that one engaged in interstate commerce may have the privilege of using the property of one not engaged in interstate commerce does not subject the property of the latter to the control of Congress. However beneficial property may be to interstate commerce, Congress can acquire no jurisdiction over it if the owner does not engage in the business of interstate commerce. This is especially true when the owner of the

property is one of the states and is not in the business of engaging in commercial intercourse with its sister states.

That which gives Congress jurisdiction to permit the abandonment of an unprofitable intrastate railroad over the protest of the state in which it is located is that it is operated as a branch of a road which is engaged in interstate commerce and its unremunerative operation might impair the main line as an artery of interstate commerce. (*Colorado* v. *U. S.*, 271 U. S. 153.) Not long before the decision of the court in the case just cited, this Court refused to permit the Interstate Commerce Commission to authorize the abandonment of a Texas railroad upon the protest of the Attorney General of that State. (*Texas* v. *Eastern Texas R. R. Co.*, 253 U. S. 204.) In that case the road was owned and operated by a Texas corporation. It was an intrastate road and did not itself engage in interstate commerce, although interstate roads used its track. In the *Colorado* case the Court distinguished the *Texas* case and said of it (p. 169): "There the railroad was permitted to be relieved only from continuing operations in interstate commerce. It was being operated independently and not as a branch of any railroad engaged in interstate commerce." In the *Texas* case the Attorney General challenged the constitutionality of the power of the Commission to invade the field of intrastate commerce by permitting such an abandonment. The Court stated that while such a challenge provoked a serious constitutional question, it

was not necessary to pass upon it for the reason that the Interstate Commerce Act gave no jurisdiction to the Commission to permit such an abandonment. While it is true that in the *Texas* case the court did not pass upon the constitutionality of the power of Congress to permit the abandonment of an intrastate line, merely remarking that the question was a serious one, the Court made the following statement which we think is quite significant (p. 216): "The road lies entirely within a single state, is owned by a corporation of that state, and is not a part of another line. *Its continued operation solely in intrastate commerce cannot be of more than local concern.* It is not as if the road were a branch or extension whose unremunerative operation would or might burden or cripple the main line and thereby affect its utility or service as an artery of interstate and foreign commerce."

Although the Court did not in either case pass upon the power of Congress to invade the field of state power by permitting the abandonment of an intrastate railroad not a part of a railroad system engaged in interstate commerce, it is important to observe that the basis of the decision of the Court in the *Colorado* case was that the intrastate line was a part of a road which was actually engaged in interstate commerce and that the continuance of its operation would directly affect the interstate operations of the interstate system. We contend that this is the basis, and the only basis, which gives Congressional power over the construction of railroad station and terminal facilities.

If it is necessary that railroad affairs of an intrastate nature must have such a direct and substantial bearing upon an interstate system as would seriously impair the operations of the interstate business of the road before Congress can have jurisdiction, then how can it be said that a sovereign state, not engaged in interstate commerce, must submit its roads to the control of Congress for the only reason that persons engaged in private commercial enterprise in which the state has no interest, may avail themselves of the privilege of using its roads?

IX.

The control of Congress over navigation affords no analogy to the situation in the case at bar.

In the case of damages suffered by the owners of beds and shores of navigable waters resulting from governmental works in and of navigation, this court has refused to require that compensation be made and has held that the Fifth Amendment has no application. (*Gibson* v. *U. S.*, 166 U. S. 269; *Scranton* v. *Wheeler*, 179 U. S. 141.) These cases and others upon the same subject were fully discussed in the case of *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251. The comments made by the court in that case make it manifest that those cases have no application to the case at bar for the reason that, as the court expressed it, (p. 259) "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore

and the submerged soil is in the various states and individual owners under them, *it is always subject to the servitude in respect to navigation created in favor of the Federal government by the Constitution.*"

No such situation is present in the case at bar for the reason that artificial structures, such as roads, have been built upon land owned by the states without being subject to the servitude of the Federal government which was the condition imposed upon all navigable waters when the states were admitted to the Union. Title to the navigable waters passed from the United States to the States at that time subject to the servitude.

The Greenleaf Lumber Co. case comments upon substantially all of the cases decided by the Supreme Court prior to that time in which it had been held that the Fifth Amendment gave no protection to a property owner. It is to be observed that all of the cases reviewed by the court in the Greenleaf Lumber Co. case were bottomed upon the theory that a property owner can acquire no interest in a navigable waterway which is not subject to the servitude of the Federal government to make improvements in aid of navigation. We are familiar with no other line of cases, either before or after the Greenleaf Lumber Co. case, which justify the United States in taking property without making just compensation. We are confident there are none.

The jurisdiction of Congress over navigable waters is *sui generis*. Their very nature subjects them to the con-

trol of Congress. The term "commerce" includes navigation. The grant of power to Congress is to regulate navigation per se; and it is the right to regulate navigation that accounts for the plenary power of Congress over all navigable waterways. This was tersely expressed in the case of *Gilman* v. *Philadelphia,* 3 Wallace 713-724, where it is said, "*Commerce includes navigation.* The power to regulate commerce comprehends the control for that purpose, of all the navigable waters of the United States which are accessible from a State other than those in which they be. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress." In the historic case of *Gibbons* v. *Ogden,* 9 Wheaton 1, Chief Justice Marshall said, (p. 190), "All America understands and has uniformly understood the word 'commerce' to comprehend navigation. * * * The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated when forming it." Since *Gibbons* v. *Ogden,* there has been no doubt but that the power of Congress over navigable streams is within the special province of Congress arising from the fact that navigation is commerce. We have already stated that the power to regulate navigation was retained by Congress when the states were admitted to the Union. In the case of the thirteen original states this power was surrendered by them to the United

States when the constitution was adopted. (*Shively* v. *Bowlby*, 152 U. S. 1.) In the case of *Railroad Company* v. *Maryland*, 88 U. S. 456-470, the court stated that while Congress had power to regulate and control navigable waterways, such power does not extend to artificial means of travel, such as roads built and maintained by the States.

All navigable waters are subject to the servitude of Congress to control navigation. State roads are subject to no such servitude.

X.

The previous decisions of this Court touching upon state regulations of roads do not sustain the power of Congress to remove from the states the right to conserve their roads.

All of these decisions may be generally classified in three groups, viz:

(1) Cases involving motor vehicle taxes, which is by far the largest group.

(2) Cases involving the validity of regulations of weights and dimensions.

(3) Cases involving the right of a motor vehicle operator to engage in interstate commerce.

So far, but two cases which have had the attention of this court have dealt directly with the power of the States to regulate the weights and dimensions of motor vehicles,

Morris v. *Duby*, 274 U. S. 135 and *Sproles* v. *Binford*, 286 U. S. 374. In both cases the validity of the state statutes was upheld. In neither of those cases did the court say that Congress might regulate the use of state roads without exercising the power of eminent domain. While it is true that in both opinions the court made the general statement that in the absence of national legislation the States may prescribe uniform regulations for motor vehicles and such statement might connote that Congress has power to defeat state power in this respect, yet an analysis of those cases does not sustain such a construction.

Congress might conceivably fix the weights and dimensions of vehicles engaged in interstate commerce, so long as such weights and dimensions would be within the limits allowed by the particular states. For example, assume that the weight limits of a particular state would be 20,000 pounds per vehicle. Congress might consider that the business of interstate commerce would be facilitated by the use of light weight commercial vehicles and might forbid the use of vehicles in interstate commerce weighing more than 10,000 pounds, or any other weight up to 20,000. Congress, having entered the field, its jurisdiction would be exclusive up to the point of the limit fixed by the State. One could not engage in interstate commerce by motor vehicle without complying with the limits fixed by Congress. Beyond that point, Congress would be substituting its judgment as to what might be a reasonable limit to conserve

the highways for that of the State. Below the limit of 20,000 pounds the regulation of Congress would not trench upon the power of the State to protect its property. The State could not permit a vehicle having a weight of 20,000 pounds to engage in interstate commerce, if the limit fixed by Congress were 10,000 pounds. That and no more was intended by the court in *Sproles* v. *Binford,* and *Morris* v. *Duby,* when it said that in the absence of national legislation the States may prescribe uniform regulations applicable alike to vehicles moving in interstate commerce and those of its own citizens.

The phrase used in the Sproles and Morris cases concerning the power of the States to regulate motor vehicles in the absence of national legislation has been frequently employed by the court in motor vehicle cases during the last twenty or more years. It had its origin in the case of *Hendrick* v. *Maryland,* 235 U. S. 610. We maintain that the oft repeated use of such phrase has never amounted to a ruling by this court that Congress might invade the field of State power to regulate the conservation and safety of use of State property for the following reasons:

(1) *Hendrick* v. *Maryland* was a motor vehicle tax case. It involved the power of Maryland to exact registration and license fees from the owners of motor vehicles. There was no issue in the case about the power of the State to regulate the weights and dimensions of motor vehicles. In sustaining the power of Maryland to require

the registration of drivers and the payment of license fees the court made the abstract statement that in the absence of national legislation, a state may prescribe uniform regulations for public safety and order in respect to the operation of motor vehicles and to that end might require the registration of drivers and payment of license fees. There was nothing said in that case, and the court did not pass upon the power of the State to conserve its property. The remarks of the court were directed solely to the extent to which the State might go in regulating the business of interstate commerce. The Commerce Clause prevents a State from taxing interstate commerce or burdening interstate commerce with taxes. And this applies equally to motor vehicle taxes as well as other forms of state taxes. It is manifest that what the court said in the Hendrick case about the application of the Commerce Clause to state regulations of drivers and the exaction of motor vehicle taxes was limited solely to the issue in that case and was not intended to include anything about the conservation of state property.

(2) The decisions of this court cited in the Hendrick case were those sustaining the power of a State to enact reasonable police regulations. Most of them, such as *Smith* v. *Alabama*, 124 U. S. 465, deal with the police power of a State over railroad companies. *Nowhere in the opinion did the court refer to Geer* v. *Connecticut*, 161 U. S. 519, or *any of the other cases sustaining the inherent power of a State to protect its property.* That would seem to make

it very clear that the remarks of the court were limited to the power of Congress to limit the business of interstate commerce.

It is important to note that in *Morris* v. *Duby*, after the Court cited *Hendrick* v. *Maryland* in support of the power of a state to regulate in the absence of national legislation, (p. 143) the Court proceeded at pp. 144-145 to say: "*Conserving limitation is something that must rest with the road supervising authorities of the state, not only on the general constitutional distinction between national and state powers, but also for the additional reason that under convention between the United States and the state, in respect of these jointly aided roads, the maintenance after construction is primarily imposed on the State.*" We submit that the statement just quoted makes it plain that in the opinion of the Court the power of a state to conserve its property is inherent. And that all that was intended by the citation of *Hendrick* v. *Maryland* was that the states may not regulate the business of interstate commerce by imposing burdensome taxes and the like or by permitting the use of motor vehicles engaged in interstate commerce having weights and dimensions exceeding those forbidden by Federal regulations. Any other construction of the opinion of the Court would result in an irreconcilable conflict within the opinion. *Sproles* v. *Binford*, while citing *Hendrick* v. *Maryland*, as we have already observed, makes no statement in derogation of state power to conserve state

property. *Sproles* v. *Binford* cites *Morris* v. *Duby,* which latter case, we maintain, is strong authority to sustain the state power.

What gives jurisdiction to a Federal Court in cases involving the validity of state motor vehicle taxes is that a state has no power to *burden the business of interstate commerce.* The question of the power of the states to protect and conserve their property does not enter into those cases. In such cases as *Interstate Transit, Inc.,* v. *Lindsey,* 283 U. S. 183, and *Sprout* v. *South Bend,* 277 U. S. 163, motor vehicle taxes were held invalid for the reason that the taxes imposed were not of a compensatory nature, but were taxes upon the privilege of engaging in the business of interstate commerce. Hence they amounted to a regulation of the business of interstate commerce and were invalid for that reason. It may be safely said that wherever this Court has held a motor vehicle tax invalid it has been upon the grounds that the tax was one upon the privilege of engaging in interstate commerce.

Carrying the thought still further, support for our position is found in the case of *Buck* v. *Kuykendall,* 267 U. S. 307. There the Director of Public Works of the State of Washington, acting under a statute of that state, refused to issue a certificate of convenience and necessity to the operator of an interstate auto stage line. In holding the statute unconstitutional, this Court said (pp. 315-316): "Its primary purpose is not regulation with a view to saftey

or conservation of the highways, but the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. * * * *Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce.*" In a more recent case, *Bradley* v. *Public Utilities Commission,* 289 U. S. 92, Bradley, who was an interstate operator, had been denied a certificate of convenience and necessity by the Public Utilities Commission of Ohio upon the grounds that the route selected by him was already too congested with traffic. In upholding the action of the Commission, this Court distinguished the *Buck* case by pointing out that in that case, safety of operation was merely an incident of the denial of the certificate; that its purpose was to prevent competition. But that in the *Bradley* case the denial of the certificate was primarily in the interest of safety and its effect upon interstate commerce was merely an incident.

Underlying all of the cases upon the subject of motor vehicle use of state roads is the liberal policy of this Court in giving the police powers of the states as wide a latitude as possible but at the same time preventing any interference upon the part of the states in the regulation of the business of interstate commerce. The cases involve a multitude of different types of statutes, facts and circumstances. Each case presents a different factual problem.

But the one yardstick by which all are measured is whether or not there has been an unreasonable interference with the business of interstate commerce. In none of them was anything said which might subtract from state power to regulate the use of state property or that Congress might do so without following the Fifth Amendment.

We think that Congress has full authority to regulate the business of interstate commerce by fixing the rates of motor carriers, providing for uniform systems of accounts, regulating the hours of service of drivers and all other matters touching upon the business of interstate commerce by motor vehicle. All those matters are regulations of the business of interstate commerce. But beyond that point, permitting Congress to enter into the field of determining for the states what type of vehicle would or would not be ruinous to its roads; substituting its judgment in the matter of conservation of state property for that of the owner; and taking control of such conservation away from the owner would constitute an unlawful exercise of the power of eminent domain.

There is not a syllable contained in any of the decisions of this Court which would even hint that the Commerce Clause gives Congress such unlimited powers. We repeat that statements found in these opinions to the effect that the states are free to act until Congress enters the field mean no more than that in matters affecting *the business of interstate commerce* the states are free to act so long

as their regulations are reasonable. Nothing more was intended.

XI.

State power to control the manner of use of state roads has not been surrendered by the states to Congress by the acceptance of the benefits of the Federal Highway Acts.

An excerpt from the report of the House Committee on Roads of January 6, 1916 is quite pertinent. It is as follows:

"FEDERAL PARTICIPATION"

"Roads are local concerns, and primarily it is the duty of the States to provide them for their people.

To carry and deliver the mail is a function of the Federal Government, and it is its duty to provide itself with the facilities necessary to a proper performance of this function, such as postmasters, post-offices and post-roads. A post-road is just as truly a postal facility as is a post-office. As in most rural communities it has been found less expensive and more expedient to rent post-offices than to build them, so it would be less expensive and more expedient to use the roads of the States as post-roads than it would to construct and maintain an independent system. In such case it would seem but just that the General Government should make some contribution to the construction and maintenance of the roads which it thus uses.

In times past when the volume and weight of postal matter were negligible the interest of the General Government in the condition of the roads was not substantial, but with the advent of rural free delivery came a Federal necessity for better roads, and with the now rapidly expanding parcel post that necessity has become acute.

JURISDICTION OVER ROADS.

Primarily roads are local concerns and jurisdiction over them belongs to the States and local authorities. This jurisdiction should never be disturbed by the General Government.''

House Reports, 64th Congress, 1st Session, 1915-1916, Vol. I, Miscellaneous I, page 4.

The following is taken from the report of the Joint Committee on Federal Aid in the Construction of Post Roads. House Documents No. 99, 63rd Congress, 3rd Session:

> ''That Congress should avoid criticism of the character above mentioned is no more important than that it should make careful provision for such administration of the Federal highway participation as will protect the several states in their right to control their local highway affairs and guard against dictatorship from a Federal Bureau in Washington.'' (pp. 22-23.)

The foregoing makes it plain that in 1916, when the first of the two highway acts was passed by Congress, there was no intention upon the part of Congress that the states should be compelled to surrender their sovereignty in ex-

change for the appropriations to be made by the central government. The Federal Highway Act of 1921 is only amendatory of the 1916 Act and makes no substantial changes in the earlier Act. The House Committee stated, in its report in substance, that since it had been less expensive for the government to use the existing roads of the states for the purpose of post roads than to build an independent system, it would be just for the government to return the obligation to the states by making some contribution to the states covering the cost of maintenance and construction; *But that in accepting contributions, the jurisdiction of the states over [redacted]oads would not and should not be disturbed.*

While it is true that reports of legislative committees cannot be resorted to for the purpose of construing a statute contrary to natural import (*U. S.* v. *Shreveport Grain and Elevator Co.*, 287 U. S. 77-83), yet, if the meaning of a statute be uncertain, the court is at liberty to have recourse to its legislative history and the statements of those in charge of it during its consideration by Congress for the purpose of ascertaining the intent of the legislative body (*U. S.* v. *Great Northern Ry. Co.*, 287 U. S. 144-154.) There is no direct language in either highway act providing for the extension of Federal power to state roads. It is our position that if the court should consider the intention of Congress uncertain, all doubt about the construction of the statute as to state power, if there be any, is

expunged by reference to the Congressional authorities just cited.

In the case of *Morris* v. *Duby, supra,* the court reviewed the three Federal Highway Acts quite extensively (pp. 140, 141) and reached the conclusion (p. 144) that there was nothing in the legislation of either the State of Oregon or of Congress to bind the State to continue the weight limits in force in Oregon prior to the acceptance of the Federal legislation by Oregon. In concluding, the court said (p. 145), "Regulations as to the method of use, therefore, necessarily remains with the State and cannot be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union and to facilitating the carrying of the mails over them."

It is important to observe that immediately preceding the statement just quoted, the court had stated that conserving limitation was something that must rest with the State upon the constitutional distinction between national and state powers. What then did the court mean by saying next that state regulations must not be so arbitrary and unreasonable as to defeat the useful purpose for which Congress has made its appropriations? The Federal Highway Act of 1921 is entitled "An Act to amend the Act entitled 'An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes' approved July 11, 1916 as amended

and supplemented, and for other purposes." (Sec. 1. U. S. Code Anno, Title 23.) The only substantial limitation in the use of the highways placed upon the States by the Act of 1921 also found in the 1916 Act was that "All highways constructed or reconstructed under the provisions of this chapter shall be free from tolls of all kinds." (Sec. 9—Title 23, U. S. Code Anno.) None of the amendments to the Act subsequent to the year 1921 place any further limitations upon the States, save Section 9-B (U. S. Code Anno. Supplement) which permits the charging of tolls upon State-owned toll bridges only until such time as the cost of reconstruction shall have been paid.

When the title of the Act and the limitations just referred to are considered together, it is apparent that the useful purpose for which Congress appropriated funds was to aid the States in the construction (*by the states, not by Congress*) of roads which might be used as rural post roads by the former, *free from tolls.* Any other construction of what was the purpose of the Act and how far the States are bound by it must rest in implication; and sovereign powers of the States are not surrendered by implication. This court said in *Wheeling and Belmont Bridge Co.* v. *Wheeling Bridge Co.*, 138 U. S. 287-293, "An alleged surrender or suspension of a power of government respecting any matter of public concern must be shown by clear and unequivocal language; it cannot be inferred from any inhibitions upon particular officers, or special tribunals, or from any doubtful or uncertain expressions."

It must be remembered that, with a few notable historical exceptions, the United States has never built post roads. Roads built by the states have been designated by Congress as post roads and post routes by the Acts of Congress of 1872 and 1884. (Secs. 481-482, Title 39, U. S. Code Anno.) In recent years Congress has contributed funds to aid the states in post road construction; but the contribution made is negligible by comparison with the total local investment in city streets, county roads and rural highways.

If, as the court said, conserving limitation, must rest with the states, then if we construe the remainder of the opinion to mean that Congress may say what limitation may be placed upon the manner of use of the roads in order to prevent the defeat of the useful purpose for which Congress made its contribution, it would follow that the first part of the court's statement (concerning the power of conserving limitation being in the states) would be rendered meaningless. How could conserving limitation rest in the states if Congress could say what in its judgment would be such a limitation as to defeat the purpose for which it made its contribution? We believe that the court intended this and no more, viz: (1) The States cannot employ any indirect methods or subterfuge to exact tolls for the use of the roads. (2) The States cannot by arbitrary or capricious action so burden the use of the roads as to interfere with their use for the purpose of carrying the mails.

The States might not by arbitrary regulation prevent vehicles carrying the mails from rendering efficient service. In other words, this court might say, that a state statute regulating the weights and dimensions of motor vehicles, as applied to vehicles carrying the mails, is so lacking in any reasonable basis as to defeat the useful purpose for which Congress made its contribution. By accepting the benefits of the contributions by Congress, the States may have agreed not to burden the use of roads by vehicles carrying the mails; but they did not agree to let Congress say what regulations might be reasonable. They did not agree to give Congress further power under the Commerce Clause. This court may prevent the States from violating their pacts with Congress by enacting legislation which, when applied to vehicles carrying the mails, is unreasonable and arbitrary. Such power is in this court because it has the right to prevent a State from violating its agreement with Congress; but not because the State has delegated to Congress the power to regulate. That power was not surrendered to Congress by the States. This court said so in *Morris* v. *Duby*. Permit us to again repeat the language of the court. "An examination of the Acts of Congress disclosed no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways——— Conserving limitation is something that must rest with the road supervising authorities of the State."

Finally, the application of canon of statutory construction, *expressio unius,* should remove any doubts about holding against the retention of state authority. By expressing the particular conditions set forth in the Highway Acts, Congress limited the obligation of the States to those limitations. By accepting the benefits of the Acts, the States had the right to expect that no other particular conditions might be added by implication.

Respectfully submitted,

OTTO KERNER,
Attorney General of the
State of Illinois,
AMICUS CURIAE.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 161.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT AND OTHERS, *Appellants,*

vs.

BARNWELL BROTHERS, INC., AND OTHERS, *Appellees.*

MOTION OF COMMONWEALTH OF KENTUCKY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE.

M. B. HOLIFIELD,
Assistant Attorney General of Kentucky.

HUBERT MEREDITH,
Attorney General of Kentucky, Of Counsel.

November 10, 1937.

WESTERFIELD-BOMTE CO., INCORPORATED, LOUISVILLE, KY.

IN THE

Supreme Court of the United States

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SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, AND OTHERS, *Appellants*,

vs.

BARNWELL BROTHERS, INC., AND OTHERS, *Appellees*.

MOTION OF COMMONWEALTH OF KENTUCKY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

THE COMMONWEALTH OF KENTUCKY, by the undersigned, its Assistant Attorney General, respectfully moves this Honorable Court for leave to file in this case the accompanying brief as *amicus curiae*. The ground of this motion (which is set out more fully in the brief, *infra*, pp. 3-6) is that a suit is now pending in the Federal Court for the Eastern District of Kentucky, brought by the trucking interests, to perpetually enjoin the enforcement of the Kentucky statute fixing weight and size limitations of trucks. That suit is similar to this one and involves substantially all the questions of law which are to be decided herein.

In view of the great importance of the questions involved, which in fact materially affect the interest of all the states, petitioner respectfully moves the Court for leave to participate by counsel in the oral argument, provided the Court can make an allotment of time in addition to that regularly allotted to counsel for appellants.

M. B. HOLIFIELD,
Assistant Attorney General of Kentucky,

HUBERT MEREDITH,
Attorney General of Kentucky,
Of Counsel.

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IN THE

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OCTOBER TERM, 1937.

No. 161.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, ET AL., *Appellants*,

vs.

BARNWELL BROTHERS, INC., ET AL., *Appellees*.

BRIEF FOR COMMONWEALTH OF KENTUCKY AS AMICUS CURIAE.

I.

PRELIMINARY STATEMENT.

The opinion of the court below is officially reported in *Barnwell Bros., Inc., et al.*, v. *South Carolina State Highway Department, et al.*, 17 F. Supp. 803.

The bill of complaint was filed by certain common and contract carriers by motor trucks engaged in interstate commerce and by certain shippers by interstate motor vehicles attacking the validity of a statute of the state of South Carolina limiting the gross weight of trucks and tractor-semi-trailers to 20,000 pounds

and the width to 90 inches. The District Court of the United States for the Eastern District of South Carolina held that these restrictions imposed an unreasonable burden, when applied to commercial trucks operating in interstate commerce upon certain designated highways and other "standard concrete highways," and hence were void as applied to such trucks upon such highways, aggregating approximately 2,400 miles.

On the 2d day of August, 1937, a bill of complaint was filed in the United States District Court for the Eastern District of Kentucky by certain common and contract carriers by motor trucks engaged in interstate commerce and by certain shippers by interstate motor vehicles attacking the validity of Sections 3, 4 and 6 of Chapter 106, Acts of the General Assembly of Kentucky, 1932, which impose the following limitations upon motor trucks and semi-trailer trucks: Gross weight, 18,000 pounds; height, 11½ feet; length, 26½ feet for trucks and 30 feet for semi-trailer trucks. The style of that case which, for the sake of convenience, will hereinafter be called the "Kentucky case," is *Adams Packing Company, et al.*, v. *G. Lee McLain, et al.*, in Equity No. 1266.

The bill of complaint, including parties, allegations and prayer, is modeled closely after the bill of complaint and the opinion of the lower court in the instant case, which will be referred to herein as the "South Carolina case."

The main prayer of the bill in the Kentucky case is as follows:

"That it be adjudged and decreed that Sections 3, 4 and 6 of Chapter 106, Acts of the General Assembly of Kentucky, 1932, are *in violation of Section 8, Article 1 of the Constitution of the United States in that* (1) they are a burden upon the free flow of interstate commerce, (2) they defeat the purposes of Federal-aid, (3) they defeat and subvert the administration and purposes of the Motor Carrier Act, and (4) they have been superseded by the Motor Carrier Act and are null and void as applied to common, contract and private carriers for hire in interstate commerce."

It is further prayed that the defendants, who are the chairman of the Kentucky Department of Highways and other officials whose duties it is to enforce the Kentucky Act, be restrained from enforcing the law on certain designated Federal-aid highways described in the bill which, according to the mileage therein stated, aggregate 1,955 miles, "or on such other highways within the boundaries of the State of Kentucky as to which, from the evidence to be taken in this cause, the said provisions of the Kentucky Act may appear to be invalid on the grounds above set forth."

Counsel for the plaintiffs in the South Carolina case are Messrs. S. King Funkhouser, J. Ninian Beall, Frank Coleman and L. Mendel Rivers. In the Kentucky case counsel for the plaintiffs are Messrs. S. King Funkhouser, J. Ninian Beall and Frank Coleman.

Answer has been filed by the defendants in the Kentucky case, and the case has been set for trial on December 6, 1937, at Lexington, Ky.

The facts in the Kentucky case will, of course, necessarily be different from those stated in the findings of fact in the South Carolina case, so we shall not attempt to discuss the evidence in the latter case or the relation of the findings of fact to the evidence. Besides, it is appropriate that the presentation of the facts be made by those who are more familiar with them than are we. In the light, however, of the applicable law, as hereinafter presented, we submit that the evidence introduced by appellants amply supports the validity of the statute.

We shall confine ourselves to a narrower issue, but one of more general importance—that it appears from the opinion of the court in the South Carolina case that the findings of fact, conclusions of law and decree were predicated upon *fundamental errors of law.* Since substantially the same principles of law must also be applied to the facts in the Kentucky case, it is obvious that we are directly interested in having those errors corrected upon this appeal.

It is a matter of vital importance to Kentucky to sustain the validity of its statute because, if it is overturned, the highways of the state will be damaged to the extent of many millions of dollars, the annual maintenance cost will be greatly raised, and the danger and inconvenience to the traveling public will be increased. We may add that the validity of the Kentucky Act in all of its aspects was fully sustained in a carefully considered opinion by the Court of Appeals of Kentucky in *Ashland Transfer Co.* v. *State Highway Commission,* 247 Ky. 144, 56 S. W. (2d) 691. This

opinion was reconsidered and reaffirmed by the Court of Appeals in *Whitney* v. *Fife,* delivered October 29, 1937, not yet officially reported. In this latter opinion, referring to the opinion of the lower court in the instant case, the court said:

> "It appears to us that the conclusion reached by the court in the South Carolina decision is not in accord with the decisions of the Supreme Court of the United States insofar as it held the South Carolina statute invalid as to certain roads, and failed to give effect to the principle that the legislative authority had the right to use its judgment in determining what regulations were necessary or proper, as was held in the various opinions of the Supreme Court cited herein."

The decision in the South Carolina case, which is one of far-reaching importance to all the states is, we submit, contrary to the fundamental principles of the Constitution of the United States and to the repeated decisions of this court, all of which recognize the principle that the states may, by laws of uniform application, protect their own property and the safety and convenience of their own citizens, and that neither the Federal Government nor its courts can interfere with such laws unless they violate the Fourteenth Amendment of the Constitution. Of course where a violation of the Commerce Clause is claimed there may be the further question of discrimination, but that does not arise in the South Carolina case as the limitations apply alike to intrastate and interstate trucks.

II.

SUMMARY OF ARGUMENT.

POINT A.

Notwithstanding the trial court's findings of fact, the validity of the act should have been sustained for the following reasons, any one of which establishes the propriety of such a decision:

1. Regulations of the size and weight of trucks for the purpose of preserving the highways and protecting public safety and convenience, which are valid as to intrastate traffic, that is, which are not violative of the due process or equal protection clauses of the 14th Amendment, and which do not discriminate against interstate commerce, affect such commerce only incidentally and do not impose upon it an unreasonable burden.

The lower court held that the provisions of the South Carolina Act in question "are *not violative of the due process or equal protection clauses** of the 14th Amendment" (R. 84). The correctness of this conclusion is not questioned by appellees by cross-appeal or otherwise. The court found that the provisions of this Act discriminated against the interstate shippers of that state in the sense that their competitors in other states, where larger and heavier trucks are permitted to operate, receive more favorable treatment by the laws of those other states than was accorded to the shippers of South Carolina by the laws of that state.

*The italics throughout this brief are ours.

This, of course, is not discrimination, in so far as the statute of South Carolina is concerned, since it is uniform in its application. It therefore follows from the lower court's own conclusion as to the 14th Amendment and from the absence of discrimination that the Act should have been held to be valid.

2. There are approximately 60,000 miles of roads of all kinds in the state of South Carolina. The lower court held that the Act imposed an unreasonable burden upon interstate commerce, and was void, in its application to approximately 2,400 miles, but not so as to the remainder of the highway system. The statute was enacted in the interest of the highway system as a whole, and while the legislature did not indicate any division in its treatment of the roads as a whole, yet if it were conceded that 4% could bear the use of larger trucks than the ones permitted, this did not forbid the legislature, in order as a practical matter to secure the admittedly needed protection of the highways and the public safety, to include the small percentage of stronger roads. The lower court's theory demands that the legislature should fix different weights and sizes for different roads—impracticable in itself and a patent judicial dictation to the legislature.

3. The lower court found that even included within the 2,400 miles there were certain weak links, which could not support the heavier and larger trucks without damage. These links consisted of inadequate bridges, sections of low-grade highway and certain city streets in the same condition. The existence of these

admittedly weak links in the chain was of itself adequate reason to sustain the action of the legislature in making the law applicable to the 2,400 miles as well as to the remaining 57,600 miles.

4. The Court found that the vehicle ordinarily used by interstate motor transportation companies, with its customary pay load, has a gross weight of 30,000 pounds, and is 96 inches in width. Even if this custom or practice of commercial truck operators were somehow imposed on the legislature of South Carolina as its standard for determining what is proper for the protection of its highways and its citizens, nevertheless a variation of approximately 6 percent in width and 33⅓ percent in weight would still leave the present law within the bounds of legislative discretion, particularly in view of the recent great increase in traffic on the highways in question.

5. The facts within the Court's judicial knowledge and this Court's decisions establish the validity of the Act. All who travel the highways know that the large commercial trucks inconvenience and endanger the traveling public, for whom the roads are primarily built, and that the bigger and heavier the trucks, the greater is the nuisance and menace they cause. Likewise they cause greater damage to the roads with consequent increased maintenance costs. The argument that the destructive effect of the pounding wheels upon the highways and bridges does not increase with the weight of the vehicle is a sophistry that will not be accepted until the laws of gravitation and momen-

tum cease to exist. As to the law questions—the validity of state statutes having the same or substantially similar provisions, and applied under conditions substantially similar to those here in issue, has been so repeatedly sustained by this Court that the questions here involved have really been foreclosed.

POINT B.

It appears from the opinion of the lower court that the Federal Highway Act (U. S. Code, Anno., Tit. 23, Sec. 1, *et seq.*) and the Federal Motor Carrier Act of 1935 (U. S. Code, Anno. Sup., Tit. 49, Ch. 8), were erroneously assumed to restrict the power of the states to impose uniform limitations upon the size and weight of motor vehicles engaged in the commercial transportation of interstate commerce on federal-aid highways. The lower court, in effect, concluded that one of the purposes of Congress in enacting these two statutes and in giving aid in the construction of the highways was to open the Federal-aid highways to the kind of trucks which appellants desire to operate, and therefore concluded that the South Carolina Act conflicted with the Commerce Clause, and hence was invalid in its application to Federal-aid highways.

The Federal Highway Act does not impose restrictions upon, or in any way interfere with, the exercise of a state's police power by uniform regulations to conserve the highways and promote the safety of the traveling public. There is not a word in the Act to that effect.

As to the Federal Motor Carrier Act the lower court held, and from its judgment in this respect there was no cross-appeal, that that act did not supersede the state statute. That Act regulated the *business,* that is, the rates and practices of motor carriers engaged in interstate commerce and expressly left the subject of regulation of the weight and size of trucks for later consideration. In fact it directed the Interstate Commerce Commission to make a study of that subject and report its conclusion. No provision of that Act restricted the states in the exercise of their police power to enact uniform laws in the interest of public safety and convenience and for the protection of the public highways.

The lower court erroneously construed certain language of this court used in the opinions in *Morris* v. *Duby,* 274 U. S. 135, 145; *Buck* v. *Kuykendall,* 267 U. S. 307, 316; *Bush & Sons* v. *Maloy,* 267 U. S. 317, 324; *N. C. & St. L. Ry.* v. *Walters,* 294 U. S. 405, 417, to establish a rule contrary to the principles stated above.

III.

ARGUMENT.

POINT A.

Notwithstanding the Trial Court's Findings of Fact, the Validity of the Act Should Have Been Sustained.

The *effect* of the Motor Carrier Act of 1935 and of the Federal Highway Act and the contributions of the Federal Government thereunder in aiding in the construction of state highways will be considered under the second point of this brief. Accordingly, for the sake of the argument of this Point A we shall assume that those statutes have no effect and have no relevancy to the point now under discussion.

Before proceeding with that discussion it may be noted that the lower court in its *findings of fact* seemed to proceed on the assumption that its function was, first, to ascertain from the *weight of the evidence* whether or not the Act in question imposed a burden upon interstate commerce. In reaching the conclusion that the Act did impose such a burden the Court gave controlling weight to what would be profitable and convenient to those using the state's property in carrying on a transportation business for private gain. The Court then proceeded to set forth in its findings of fact all the facts and arguments which tended to support the primary conclusion. Although the very substantial amount of evidence as to the physical facts pertaining to the highways and bridges in controversy

and opinions of eminent highway engineers strongly and directly supported the reasonableness of the Act, the Court did not indicate that there was any conflict in the evidence—practically all of the evidence introduced by the appellants was simply ignored. In so doing we submit that the lower court misconceived its duty which was to make findings of fact, not in an ordinary case but in a case where the issue is as to the validity of the exercise of a state's police power in protecting its property and its citizens. We shall show that the Act did not discriminate against interstate commerce and that Congress has not restricted the police power of the states to preserve the highways and to protect public safety and convenience. Therefore, the issue of fact before the Court was whether or not the Act was so unreasonable and arbitrary as to be invalid. Since the subject manifestly lies within the police power of the state, the ultimate question of fact before the Court was whether the evidence introduced by the appellants and the facts within the Court's judicial knowledge made the question as to reasonableness a *debatable one. Sproles* v. *Binford,* 286 U. S. 374, 388. If so the legislature's judgment stands. Since the appellants' evidence at least created a sharp conflict with that introduced by appellees on the material issues of fact, this condition of the record should have been fairly portrayed in the findings of fact. The one-sided findings of fact made by the trial court are, however, merely an incidental application of the following more serious errors showing the court's fundamental misconception of the law of the case.

1. Since the Lower Court held the Act Valid Under the 14th Amendment and Since Discrimination, the Only Additional Feature Pertinent to the Commerce Clause, was Not Shown, the Court's Opinion on Its Face Shows that the Act Should have been Sustained.

It is said in the opinion of the lower court (R. 57), that the provisions limiting the gross weight of single trucks and tractor-semi-trailer trucks to 20,000 pounds, and limiting the width to 90 inches, are attacked on the grounds "that the provisions of the act in question are in violation of the 14th Amendment in that 'they constitute an unreasonable, arbitrary and capricious interference with the rights of plaintiffs to use the highways in a reasonable manner and for a lawful purpose.'" It may be also noted that in the body of the bill and in the prayer (R. 7, 18) it was alleged in support of the contention of a violation of the 14th Amendment that the weight provisions "have no real and substantial relation to the avowed objects and purposes of such Act as declared in Section 1 thereof, that is, to achieve economy in highway costs and to protect the safety and lives of the traveling public." This contention was rejected by the lower court, the fourth conclusion of law being as follows:

> "That the provisions of Act 259 of South Carolina of 1933 *are not violative of the due process or equal protection clauses of the 14th Amendment*" (R. 84).

In referring to its conclusion on this point the court, in its opinion (17 F. Supp. 803, 806), said:

> "This is sufficiently dealt with by the Supreme Court of South Carolina in the case of State, *ex rel.* Daniel v. John P. Nutt Co., 180 S. C. 19, 185 S. E. 25, cert. denied 297 U. S. 724, and there is no occasion to add anything to what is there said as to this aspect of the case" (R. 57).

This conclusion of the lower court related to the application of the law to the 2,417 miles of standard pavement as well as to the remainder of the highways of all kinds, that is, approximately 57,600 miles.

Assuming, as we do in this portion of the discussion, that the South Carolina Act is not rendered invalid by reason of the Federal Highway Act or the Motor Carrier Act of 1935, we submit that, since the Act was uniform in its application, that is, since it *did not discriminate* against trucks in interstate commerce but applied to all trucks alike, it follows from the lower court's conclusion quoted above that the Act was not invalid under the Commerce Clause of the Constitution. *Sproles* v. *Binford,* 286 U. S. 374, 388, 389; *Morris* v. *Duby,* 274 U. S. 135, 143; *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 365, 366. In the case last cited the court, referring to regulations by the state of the use of its highways to promote public safety, said:

> "Regulations to that end are *valid as to intrastate traffic* and, where there is *no discrimination against the interstate commerce* which may be affected, *do not impose an unconstitutional burden upon that commerce.*"

It is true that in the 9th, 10th and 14th findings of fact (R. 79-80), and possibly in other findings, the court concluded that the enforcement of the Act would result in *discrimination* against South Carolina's textile mills, vegetable growers and manufacturers of furniture. However, it will be observed that the court used the word "discriminate" here in the sense that the competitors of the South Carolina shippers in other states were permitted by the laws of those states to operate larger and heavier trucks than were permitted by the laws of South Carolina. This, of course, is not the kind of discrimination which renders a state statute invalid under the commerce clause; in fact, it is not, properly speaking, discrimination at all. If a state statute is *uniform* in *its* application to local or intrastate commerce and to interstate commerce, there is no discrimination against interstate commerce, because of more favorable statutes of other states.

It will be recalled that in the analogous, and in many respects practically identical, case of *Sproles* v. *Binford, supra,* the court discussed the two questions here under consideration and after holding, first, that there was no violation of the *Fourteenth Amendment* (though the Texas weight limitation was 7,000 pounds per load, which is more exacting than the South Carolina statute), it took up the second question of interference with interstate commerce and, after showing that the Federal Highway Acts did not interfere with the power of the state to enforce the statute in question, in effect held that the only additional feature pertinent to the commerce clause was one of *discrimination.* It

decided that there was no discrimination, since the states could act "according to the special requirements of their local conditions;" and it disposed of any contention that it was discrimination for Texas to treat trucks in a manner different from their treatment by other states with this conclusive declaration:

> "As this principle maintains essential local authority to meet local needs, it follows that one State cannot establish standards which would derogate from the equal power of other States to make regulations of their own" (286 U. S. 390).

The lower court seemed to proceed upon the idea that the operator of a truck engaged in interstate commerce stands in some different and better position in attacking this law for unreasonableness than the operator engaged only in intrastate commerce. Except for the matter of discrimination (as to which there is none), the intrastate trucker would occupy the same position as the other in a suit based upon the denial of his alleged constitutional right to use the highways which are strong enough to bear his vehicle. The lower court, having specifically held that there is no violation of the Fourteenth Amendment, thereby disposed of the claims of plaintiffs (whether engaged in interstate or intrastate transportation, these being as to this question of equal status if not importance)—based upon the allegation that they were unconstitutionally deprived of the use of the highways which would carry their vehicles. The only difference between interstate

and intrastate commerce as here involved is that *discrimination* against interstate commerce would have rendered the act as to those so engaged invalid. But when there is no discrimination (as clearly appears from both the opinion and the statute), the multiplication of alleged inconveniences and losses suffered by the plaintiffs interested in interstate commerce does not give them a position any different from, or better than, the position of those engaged only in intrastate commerce.

2. Since the Lower Court Held that the Act Did Not Impose an Unreasonable Burden on Interstate Commerce in Its Application to 96% of the Highways, It was Error to Hold It Invalid in Its Application to the Remainder.

The lower court held that, with the exception of the 2,417 miles of standard pavement, "the said provisions of the Act cannot be condemned as an unreasonable burden upon interstate commerce when applied to the other roads and highways of the state" (Conclusions of law No. 2; R. 84). In other words, the court held that, as applied to approximately 96% of the highways of the State, the Act did not impose an unreasonable burden upon interstate commerce.

In its seventeenth finding of fact (R. 81) it is stated "that there are approximately 60,000 miles of roads of *all* kinds in the State of South Carolina." We think it is therefore fair to assume that the following statement taken from the opinion in *Sproles* v. *Binford*, 286 U. S. 374, at 385, may be properly applied to the highways of South Carolina:

> "There are all types of roads, 'ranging from dirt, gravel, shell, asphalt and bitulithic to concrete and brick highways' of varying degrees of strength."

Every state is confronted with the problem of preserving all of its highways and of protecting the safety of the public in its use of those highways. Many practical factors must be taken into consideration by the legislature in determining its policy as to the weight and size restrictions which it will impose upon motor vehicles. One possible problem (though we have never heard of it as a practical one) might conceivably be to decide whether those restrictions shall be made state-wide in their application, or whether it is practicable to divide the highways into various classes and make different restrictions applicable to the different classes. Theoretically, the latter might be wise and proper if all of the different classes of highways were uniform in thickness, width and condition, character of the subgrade, the vertical and horizontal curves and grades, the amount of the traffic, etc. However, the Court knows judicially that there is no *uniformity* as to any of these matters in any state, and the record shows there was no uniformity in South Carolina.

Moreover, there is the factor of *enforcement* which, as a practical matter, is one of great importance. Regardless of how perfect a law may be from a scientific standpoint, it is useless unless it is enforced. The difficulty of the enforcement of these restrictions is constantly brought to the attention of

the legislatures by the public press and by the reports of the officers charged with the duty of enforcing the law. It is a matter of common knowledge that even when these restrictions are uniform in their application on all the highways of the state, it is an exceedingly difficult matter to enforce them. It is a well known fact that the method generally adopted for the enforcement of these laws is to establish traffic officers and weighing stations or appliances at the crossings of the most heavily traveled highways, and that the roads of inferior type must largely depend for their protection upon the work done at those strategic points. If the heavy trucks were permitted to operate over a portion of the roads in any state, it would mean, as a practical matter, that they would use any roads they pleased.

Furthermore, the *type of the pavement* and *its condition* are subject to change as a result of factors over which the legislature has little or no control. Pavements are broken up and destroyed, sub-grades subside, bridges must be renewed and repaired. During the periodical reconstruction of the highways and the bridges, traffic must be detoured over other highways. Such other highways would, as a practical matter, be generally of an inferior type which would quickly be destroyed by the heavy traffic.

It is true, as the lower court said in its opinion: "A system of highways of 2,400 miles is a substantial system" (R. 67); but it is also true that these 2,400 miles comprise a relatively small portion, about 4%, of the entire highway system of the state. And, as

will be later shown, there are weak bridges and sections of inferior roads within this 2,400 miles. It must be obvious that the mere fact that there may be a substantial mileage in any state comprising a connected system which will sustain, without immediate injury, trucks of a certain size and weight does not obligate the legislature to vary its restrictions so as to permit its property to be used by such trucks.

The fact that the legislature, after considering all the facts pertinent to the exercise of its own legislative judgment, decided not to make any exceptions and classifications in the application of its law for the benefit of commercial carriers engaged in interstate commerce so as to permit them to use the state's property up to its maximum capacity, does not invalidate the law and does not impose upon the truck operators, or the business in which they are engaged, an unreasonable burden. The burden is merely incidental to the proper protection of the state's property as a whole.

In a broader and more correct sense there is no burden at all. The State permits commercial truck operators to use its property as a place for conducting their business. This privilege is a very valuable one. The fact that it is not greater and more valuable than the State deems wise to grant does not cause the benefit to become a burden.

The principle of permitting the legislatures to consider the application of a law as a whole and of declining to interfere because of a resulting hardship in particular instances has been recognized in a wide

variety of cases. It was recognized and applied by this court in this particular situation in the case of *Sproles* v. *Binford,* 286 U. S. 374, where the court sustained a Texas statute limiting the size and load of trucks against an attack upon the ground that it constituted an unreasonable burden upon interstate commerce. It said at page 385:

> "The statute was enacted in the interest of the whole State, and the State highway system in particular, and the operations of complainant and interveners constitute a very small portion of the traffic which the highways bear."

See, also, *New York* v. *Hesterberg,* 211 U. S. 31, 40; *Purity Extract and Tonic Co.* v. *Lynch,* 226 U. S. 192, 201; *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388; *Nashville, etc., R. Co.* v. *White,* 278 U. S. 456, 459. The same principle has been recognized in a great number of cases sustaining the validity of classifications and exemptions. See, for example, *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 370; *St. Louis & Iron Mtn. Ry.* v. *Arkansas,* 240 U. S. 518.

If the Legislature concluded—and evidently it did so conclude—that it was necessary to apply these weight and size restrictions to the 4% of the highways in order, as a practical matter, to secure the needed protection of the highways and the public safety on the 96%, "the inclusion of a reasonable margin to secure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity." *Euclid* v. *Ambler Realty Co.,* 272 U. S. 365, 388.

The case, however, is fully covered by the well established principle that granted the *power* of the legislative body, the *wisdom* or *propriety* or even *justice* of its act is not open to the courts. And in the case of a state's exercise of its police power to protect its own property and citizens, the right of the courts to interfere is still further restricted, the rule being that in such a case, if there is any basis for a difference of opinion as to the propriety of the statute, it comes within the scope of legislative discretion, and the judgment of the Legislature and not of the Court prevails.

The Court, in considering this identical question in connection with the Texas statute limiting the weight and size of trucks, thus stated the principle in *Sproles* v. *Binford, supra* (388):

> "When the subject lies within the police power of the State, *debatable questions as to reasonableness are not for the courts but for the legislature,* which is entitled to form its own judgment, and its action *within its range of discretion* cannot be set aside because compliance is *burdensome.*" (Citing authorities.)

Proceeding the court said (389):

> "*Applying this principle,* this Court in *Morris* v. *Duby,* 274 U. S. 135, sustained the regulation of the Highway Commission of Oregon, imposed under legislative authority, which reduced the combined maximum weight in the case of motor trucks from 22,000 pounds, which had been allowed under prior regulations, to 16,500 pounds."

Conceding, as the lower court did, that the South Carolina statute fixed a limitation that was proper and reasonable as to trucks traveling 96% of the roads, it seems almost ridiculous to hold that the Legislature was without constitutional power to apply the same limitation to the other 4%. In so holding the court, having found that this 4% is able to sustain trucks larger and heavier than the prescribed limitation, disregards all other considerations, such, for example, as added expense of constructing and maintaining the roads, the increased danger and inconvenience to the traveling public, the natural likelihood of the larger trucks, once in the state, using some of the other 96% of the roads, the difficulties thereby caused in policing the roads, the ill effects upon the numerous links connecting the different sections of 4%, etc.—considerations which the Legislature properly should, and doubtless did, have in mind when it prescribed a general limitation applicable to all the state roads.

3. In View of the Existence of Bridges, Sections of Highway and City Streets Which are Inadequate to Sustain the Larger and Heavier Trucks, the Court Should Not Have Substituted Its Judgment for that of the Legislature in Determining Whether the Law Should Apply to the Entire System.

At page 809 of its opinion (17 F. Supp. 803) the lower court said with respect to the 2,400 miles: "As there are a few bridges which were not built to support the heavy trucks of modern traffic, and a few which are too narrow, we think that the enforcement of the Act should not be held unreasonable as to such

bridges, provided they are properly marked with warning signs forbidding trucks of excessive weight or size to enter upon them." The court further said with respect to these bridges at page 815:

> "If there were a great many of these, their presence would justify the application of the Act to the entire system of highways, but the evidence shows that they are comparatively few in number; and interstate commerce, or at least a part of it, could be so routed as to avoid them entirely."

But to enforce the law it would be necessary to keep patrolmen, or other persons authorized to make arrests, stationed at these bridges day and night. We submit it was for the legislature and not the Court to determine whether adequate protection would be secured by posting notices and "routing" heavy traffic so as to avoid these bridges.

At page 809 of its opinion, again referring to the 2,400 miles, "there are short sections of such highways which have not as yet been constructed of standard paving," yet the Court held the Act invalid in its application to the entire 2,400 miles, not because these sub-standard sections could sustain the heavy traffic without injury, but because the Court did not think they were "of sufficient importance" (Finding 18, R. 81).

It is also apparent from the opinion of the court (17 F. Supp. 811) that there are streets in certain of the cities and towns on the so-called "standard pavement" as to which the application of the provisions of the law

was not unreasonable. However, the lower court, apparently acting on the assumption that the burden was upon the state to affirmatively establish the validity of the Act by the weight of the evidence, disregarded the proof as to these streets on the ground "there is no showing, however, that there has been substantial damage to any streets as a result of the heavy traffic which has been passing over them for the past five years." We submit that it was for the legislature and not for the Court to determine whether, in view of the inadequate bridges, sections of highways and city streets, the Act should be applied to the 2,400 miles as well as to the remainder of the highways. The lower court said:

> "It is unreasonable to withhold the entire system from the use of such traffic because of a few weak links, which, if injured by the traffic, can be repaired at comparatively slight expense."

We submit that this is a matter for the Legislature and not for the court to determine. Commercial motor carriers, which use the state's property at its sufferance, even though they are engaged in interstate commerce, have no right to impose *any* expense upon the state which the latter is unwilling to bear for their benefit, provided the law applies to interstate and intrastate transportation alike. Since the Federal Government itself may not take or destroy the property of the states, it may not, under its power to regulate commerce, authorize others to do so.

4. Assuming the Findings of Fact, However One-sided, to be Correct, Nevertheless the Provisions of the Act are Within the Limits of Legislative Discretion.

In the findings of fact (R. 83; No. 22) it is said "that gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but wheel or axle weight * * *." And in finding No. 17 it is said (R. 81):

> "All such pavement is capable of sustaining without injury * * * an axle load of 16,000 to 18,000 pounds, depending upon whether the wheels are equipped with high pressure or low pressure pneumatic tires."

The court entirely loses sight of the fact that a *gross weight limitation* automatically results in an *axle weight limitation,* since the entire weight must be distributed upon the axles with which the truck is equiped. Theoretically, the distinction between low pressure and high pressure tires may be correct, but, as a practical matter, it is difficult, if not impossible, to apply in the enforcement of the law.

It is interesting in this connection to note that the Texas statute under attack in the case of *Sproles* v. *Binford,* 286 U. S. 374, provided for a *net load* rather than a *gross load* limitation; and it appears from page 388 of the opinion in that case that the truck operators, in order to have that Act declared invalid, contended "that damage from overweight can be prevented *only by regulations which fix a maximum gross load* and provide for its proper distribution through axles and

wheels to the highway surface." However, that effort "to make scientific precision a criterion of constitutional power" received the unqualified disapproval of this court.

If it be assumed, as it properly may (R. 135), that approximately 80% of the gross load of many trucks is carried upon the rear axle, and 20% upon the front axle, the practical application of the 20,000 pound gross weight limitation law is to impose a 16,000 pound axle limit. This, we submit, even though it may not have been in accordance with scientific principles, nevertheless came "within the broad range of legislative discretion."

It is said in the 20th finding of fact (R. 82):

> "The usual vehicle used by motor transportation companies in interstate commerce is a tractor-semi-trailer combination * * * carrying a pay load of 10 tons or 20,000 pounds,"

which, according to finding 16 (R. 81), makes "a gross load of about 30,000 pounds."

If the practice of motor carriers, when permitted to haul any load they please, can be said to be a factor which a state legislature must consider in enacting its laws, we submit that the action of the state of South Carolina in fixing the limit at 20,000 pounds instead of 30,000 pounds was within the limits of legislative discretion. It should be noted, however, that with the law annulled as to the 2,400 miles, there would be *no limit* upon the size and weight, and the "customary" 30,000 could, and doubtless would, be exceeded

at the will of the operating company, regardless of the damage to the roads.

The contention that the Act is invalid because it did not permit the operators of tractor-semi-trailer combinations to haul heavier gross loads than the operators of ordinary trucks is so obviously unsound that a statement of the proposition condemns it. The fact that appellees desire to operate the larger and more complicated combinations does not obligate the state to make classifications or to grant special privileges according to their wishes. The provision in question tends to reduce the size and weight and hence the danger, inconvenience and destructive effect of these combinations.

In its decree (R. 86) with respect to the width limitation of 90 inches, the court enjoined the enforcement of so much of the Act as fixed for trucks a maximum width of 90 inches "if the vehicle does not exceed 96 inches in width." In other words, it decreed that the maximum width limit should have been 96 inches and that the Act could be enforced if a vehicle exceeded 96 inches. Thus by a definite and deliberate species of legislation, more remarkable than any we have ever run across in the books, the court, not content with condemning and enjoining the width limitation fixed by the legislature, itself fixed a different and greater limitation, and declared that it would be unlawful to exceed that new limitation and that the law could be enforced if the offender used a truck wider than the limit thus fixed by the court. This is going far beyond

the situation in *Sproles* v. *Binford,* of which the court said that it was subjecting the state to an "intolerable supervision hostile to the basic principles of our Government."

That the court found *a* limitation to be necessary, and fixed it at not greater than 96 inches as against the legislature's judgment of 90 inches, itself shows that the difference of 6 inches could not possibly remove the subject from the rule as to the "broad range of legislative discretion" declared in *Sproles* v. *Binford.* It is true in South Carolina as it was in Texas, as found by the court in that case, that "on account of the width of traffic lanes, vehicles of greater width or length than that prescribed by the statute are hazardous for passing traffic, and the hazard will be materially reduced by a lighter load and a lesser width and length." *Sproles* v. *Binford,* 286 U. S. 374, 386.

It is also interesting to note in this connection that the primary basis for the finding that the width limitation of 96 inches is unreasonable is "the fact that all other states in the Union permit a width of 96 inches" (Find. No. 24, R. 83). This, in effect, permits other states to determine what restrictions South Carolina shall impose for the safety of its citizens. This is directly contrary to the principle announced by the Court in *Sproles* v. *Binford,* 286 U. S. 374, at 390 (quoted *supra*):

> "One state cannot establish standards which would derogate from the equal power of other states to make regulations of their own."

The lower court in its findings of fact and in its opinion repeatedly referred to *the great and constantly increasing amount of motor traffic upon the 2,400 miles of high-class highways* to justify the conclusion that the restrictions upon size and weight were unreasonable. It is submitted that evidence of such a condition is one strong justification for seeking to preserve those roads. This very point was emphasized by the court in the case of *Sproles* v. *Binford* (*supra*), where, after referring to the increase in recent years of truck registrations, the court said at page 385:

> "This *increase* in 'truck density' *justifies the dimensional and weight restrictions* of the statute in the interest of *public safety and convenience and highway protection.*"

In *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, the court said at page 373:

> "The legislature in making its classification *was entitled to consider frequency and character of use* and to adapt its regulations to the classes of operations, which by reason of their *habitual and constant use of the highways brought about the conditions making regulation imperative* and created the necessity for the imposition of a tax for maintenance and reconstruction. As the Court said in Alward v. Johnson, 282 U. S. 509, 513, 514: 'The distinction between property employed in conducting a business which requires constant and unusual use of the highways, and property not so employed, is plain enough.' See, also, Bekins Van Lines v. Riley, 280 U. S. 80, 82; Carley & Hamilton v. Snook, 281 U. S. 66, 73."

This principle justified the legislature in applying to the more densely heavily traveled highways restrictions which may be below the maximum capacity of such highways.

5. The Facts of Common Knowledge and Within the Court's Judicial Cognizance and the Pertinent Declarations and Decisions of this Court Establish the Validity of the Act here in Question.

In *Aero Mayflower T. Co.* v. *Georgia Pub. Serv. Com.*, 295 U. S. 285, the court sustained the validity of a statute of the state of Georgia regulating private motor carriers for hire and imposing, among other conditions, an annual license fee. The validity of the Act was challenged under the Commerce Clause. At page 289 the court said:

> "Its validity in this aspect is attested by decisions so precisely applicable alike in facts and in principle as to apply a closure to debate."

This statement also applies to the South Carolina Act. The validity of that Act was attacked under both the 14th Amendment and the Commerce Clause in *Daniel* v. *John P. Nutt Co.*, 180 S. C. 19, 185 S. E. 25. After referring to the allegations of the petition, the South Carolina Appellate Court, at page 31, summarized the facts which the plaintiffs offered to prove, and it will be seen that these are substantially the same facts as were introduced in the instant case. At page 31 the court said:

"The Legislature, however, after due consideration of all the facts and circumstances, concluded that the act was necessary, first, 'to achieve economy in highway cost,' and, second, 'to permit the highways to be used freely and safely by the traveling public.' *That heavy vehicles increase the cost of construction and maintenance of highways is a fact of common knowledge.* For more than twenty years this state has graduated the license fees of motor vehicles according to their weight. *All know that the danger of a motor vehicle increases with its weight,* and that the width and length of the motor vehicles *bear direct relation to the safety of others using the highways.*"

And again on page 32 the court said:

"The court here *judicially knows that the facts exist, bringing the legislative power into play.*"

On page 29, after holding "the police power of the state concerning its highways has not been impaired by the Federal-aid statutes," it was said:

"It is recognized that the commerce clause of the Federal Constitution goes merely to the extent of inhibiting such regulations as result in *discrimination* against motor vehicles used in interstate commerce, and does not restrict the state in the exercise of its police power in this respect, *so long as the statute applies equally to all.*"

The doctrine of that case was virtually approved by this Court which denied certiorari 297 U. S. 724. The only substantial change in conditions which has

occurred between the time of the decision in the Nutt Case and the institution of this suit was the enactment of the Motor Carrier Act of 1935. We submit therefore that (excluding the simple legal question as to whether that Act superseded the state statute), the issues of both fact and law, elaborately discussed in the opinion of the lower court, have already been considered and determined by this court.

In *Sproles* v. *Binford, supra,* the court upheld, against an attack under the Commerce Clause, the validity of the Texas statute imposing restrictions on the size of trucks, the net load limitation there of 7,000 pounds being, in effect, a lower gross load limitation than that of the South Carolina Act. (See Note 6, page 389 of the opinion.) In discussing the question the court said (p. 388):

> "*Limitations of size and weight* are manifestly subjects *within the broad range of legislative discretion.* * * * When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature * * *."

In *Morris* v. *Duby,* 274 U. S. 135, the court sustained the action of the Highway Commission of Oregon in reducing the gross weight of motor trucks from 22,000 pounds to 16,500 pounds. In that case the court said at page 143:

> "In the absence of national legislation especially covering the subject of interstate commerce, the State may *rightly prescribe uniform*

> regulations adapted to promote *safety* upon its highways and the *conservation* of their use, *applicable alike to vehicles moving in interstate commerce and those of its own citizens.*"

Upon the general question as to the relationship between heavy trucks and the damage to highways and danger to the traveling public, that there is a definite relationship is not only a matter of common knowledge, of which the court will take judicial notice, but it has frequently been so declared by this court; and such of those authorities as involve interstate commerce hold that if the trucks are of size and weight which the state deems dangerous or destructive, they may be excluded provided only the law applies uniformly to vehicles engaged in intrastate and to those engaged in interstate commerce.

In the last case cited, *Morris* v. *Duby,* the court quoted with approval from its opinion in *Buck* v. *Kuykendall,* 267 U. S. 307, at 315:

> "To exclude unnecessary vehicles—particularly *the large ones commonly used by carriers for hire*—promotes *both safety and economy.* State regulation of that character is valid *even as applied to interstate commerce,* in the absence of legislation by Congress which deals specifically with the subject."

In *Bradley* v. *Pub. Util. Comm'n,* 289 U. S. 92, the court said at page 95:

> "The State may exclude from the public highways vehicles engaged exclusively *in interstate*

commerce, if of a size deemed dangerous to the public safety."

Again, in *Hicklin* v. *Coney,* 290 U. S. 169, at page 172:

> "Carrying capacity, *the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways."*

Also in *Hendrick* v. *Maryland,* 235 U. S. 610, page 622:

> "The movement of motor vehicles over the highways *is attended by constant and serious dangers to the public,* and is also abnormally *destructive to the ways themselves.* * * *
>
> "In the absence of national legislation covering the subject *a State may rightfully prescribe uniform regulations necessary for public safety and order* in respect to the operation upon its highways of all motor vehicles—*those moving in interstate commerce as well as others."*

So, too, in *Sprout* v. *South Bend,* 277 U. S. 163, page 169:

> "In the absence of federal legislation covering the subject, the State may impose, even upon vehicles *using the highways exclusively in interstate commerce, non-discriminatory regulations* for the purpose of insuring *the public safety and convenience."*

In *Carley & Hamilton* v. *Snook,* 281 U. S. 66, the court said at page 72:

"That the legislature may graduate the fees *according to the propensities of the vehicles to injure or to destroy the public highways,* and may exempt those with respect to which this tendency is slight or nonexistent, cannot be doubted. We may not assume that vehicles weighing less than 3,000 pounds, with loads which they usually carry, are not of this class, or that vehicles weighing more than 3,000 pounds with their accustomed burden added do not have this tendency. *It is for the legislature to draw the line between the two classes.*"

In *Continental Baking Co.* v. *Woodring,* 286 U. S. 352, 364, the court quoted with approval the following from the opinion of the Federal District Court:

"*The highways are being pounded to pieces by these great trucks* which, *combining weight with speed,* are making the problem of maintenance well-nigh insoluble. The Legislature but voiced the sentiment of the entire state in deciding that those who daily use the highways for commercial purposes should pay an additional tax. *Moreover, these powerful and speedy trucks are the menace of the highways.*"

And said at page 365:

"Motor vehicles may properly be treated as a special class, because their movement over the highways, as this Court has said, 'is *attended by constant and serious dangers to the public, and is also abnormally destructive to the highways themselves.*'"

According to the decision of the lower court the state is no longer "master in its own house" (Stephenson v. Binford, 287 U. S. 251, 276), but becomes the servant of destructive, and therefore unwelcome, guests.

In *Gilman* v. *Philadelphia,* 3 Wall. 713, 18 L. Ed. 96, sustaining the validity of the action of the City of Philadelphia in constructing a bridge over the Schuylkill River which would prevent the passage over that navigable stream of vessels having a mast, the court said at page 101:

> "It is for the municipal power to weigh the considerations which apply to the subject. * * * If a State exercise *unwisely* the power here in question, the evil consequences will fall chiefly upon her own citizens. They have more at stake than the citizens of any other State. * * * Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the State is *plenary,* and its exercise *in good faith cannot be made the subject of review by this court.*"

Notwithstanding these decisions, the effect of the lower court's opinion is to compel every state, which has declined to yield to the demands of the great interstate trucking companies, to make its choice between two alternatives, both of which are exceedingly burdensome and costly. Either it must amend its laws, in accordance with the demands of the large trucking companies, which are using the public roads as a place for carrying on their transportation business for profit,

or it must incur large expenditures and detach its legal, engineering and motor departments from their regular duties in order to prepare and conduct a far-flung lawsuit involving technical engineering problems and minute details with respect to the structure, condition and use of every mile of its highway system.

In view of the protection given by the decisions of this court, it seems fundamentally wrong for state after state (see citations, *infra,* p. 62) to be required to spend the time of its officials and the money of its taxpayers in the elaborate preparation for trial of issues of fact where the bill itself shows they are necessarily the same in principle and substantially the same in facts as those involved in the cases already decided.

POINT B.

It Appears from the Opinion of the Lower Court that the Federal Highway Act and the Federal Motor Carrier Act Were Erroneously Assumed to Restrict the Power of the States to Impose Uniform Limitations Upon the Size and Weight of Motor Vehicles Engaged in the Commercial Transportation of Interstate Commerce on Federal-aid Highways.

Even if we disregard for the moment what plainly appears from the opinion of the lower court to be the basis for its decision, it is obvious from the foregoing decisions and repeated declarations of this court that the lower court, in order to hold the South Carolina Act invalid, must have developed and applied to the facts in this case novel principles of constitutional law.

A careful analysis of the lower court's opinion, we think, makes clear that the Court would not have rendered the judgment from which this appeal is taken *but for the effect attributed to the Federal Highway Act and the Federal Motor Carrier Act.* It is true that the only reference to either of these acts in the findings of fact or conclusions of law is in the third conclusion of law, which is as follows:

> "3. That Congress has not assumed to control size and weight of vehicles by the Motor Carriers Act of 1935" (R. 84).

However, beginning near the middle of page 811 of the opinion in 17 F. Supp., and continuing on to the close of page 816—five pages—the court's discussion of legal principles is largely predicated upon the *effect* attributed to the two Federal acts, and its discussion of the evidence is made in the light of these conclusions as to the law of the case. For example, at page 811 it is said that the fact that the Federal Government has aided in the construction of the highways "is, we think, a circumstance which should be considered in passing upon the reasonableness of a state statute."

On page 813 it is said that the State act must not "defeat the useful purposes for which Congress made its *large contribution toward the building of the highways.*"

On page 814 it is said that the Federal Motor Carrier Act "is of significance because it makes clear the purposes of Congress *that said highways shall be open to commerce of that character.*" And, again, the fact

that "Congress is regulating" the business of motor carriers is apparently regarded by the Court as a matter "of *great importance.*"

It is also significant that the decree was limited to "*federal-aid highways*" (R. 81, 85).

Finally, it is demonstrated that the lower court held that the effect of the two federal statutes was to establish a new rule of law by the fact that, although the South Carolina statute is (1) *valid under the 14th Amendment* and (2) *does not discriminate* against interstate commerce, it was nevertheless held that that Act imposed an unreasonable burden upon such commerce.

Apparently the lower court considered the enactment of these federal statutes and the contributions made by the Federal Government under the Federal Highway Act as a material fact in determining whether the state law imposed an unreasonable burden upon interstate commerce, and also attributed to the federal statutes some effect as a matter of law *in circumscribing the powers of the state to enact laws to preserve the highways and protect public safety.*

The Court did not go so far as to hold that by the enactment of these federal statutes Congress had so *occupied the field* as to preclude state regulation—in fact it held to the contrary—but by considering the legal effect of these acts and their enactment as a matter of evidence a sort of halfway ground was reached with the apparent conclusion that the Federal Court was thereby authorized to substitute its judgment for that of the legislature in determining what

the weight and size restrictions should be. It seems, therefore, essential that we consider both of these acts and determine whether or not the court committed an error in attributing to them the effect above mentioned.

1. Neither the Federal Highway Act Nor the Fact that the Federal Government has Aided in the Construction of State Highways Restricts or Affects the Power of the State to Enact and Enforce the Legislation Here in Controversy.

We shall consider this act first, because it appears that the opinion of the lower court was largely based upon a misconstruction of certain language of this court in some of its decisions discussing the purposes and effect of this act.

The Act of Congress known as "The Federal Aid Act" (Act July 11, 1916, c. 241) was entitled "An Act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes." This was amended by the Federal Highway Act of November 9, 1921, c. 119, U. S. Code Ann., Title 23, Sec. 1, *et seq.*, which was entitled "An Act to amend an act entitled 'An Act to provide that the United States shall aid,'" etc. Neither in the title nor in any provision of these acts, nor in any subsequent amendment thereto, is there any language which even faintly suggests that Congress intend to assert any authority to regulate the size and weight of the vehicles which might use the Federal-aid highways, or to restrict in anywise the power of the states to enact regulations for the preservation of the highways and the protection of the safety and convenience of travel

thereon. On the contrary, the Act itself contains a provision which affirmatively recognizes that by this act Congress asserted no such authority.

Section 19 is as follows:

> "The Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this chapter, including such *recommendations* to the Congress and the State highway departments as he may deem necessary for *preserving and protecting the highways and insuring the safety of traffic thereon.* (Nov. 9, 1921, c. 119, §18, 42 Stat. 216.)"

If Congress had intended to restrict the power of the states in enacting laws for preserving and protecting the highways and the traffic thereon, it would not have imposed the duty upon the Secretary of Agriculture *to make recommendations to state highway departments* to adopt regulations for these purposes. The main purpose of the statute as announced in its title was to *aid* the states, and not to *interfere* with them, in furnishing and maintaining highway facilities for the public. See in this connection *Townsend* v. *Yoemans,* 301 U. S. 441, 454. Notwithstanding the aid of the Federal Government in the construction of the highways, the *title* to the property and the *burden of maintaining* them remain with the states. Congress did not provide for any independent action along these lines by the Federal Government. The contributions of federal aid were conditioned upon contractual arrangements being made with the state which was to

receive the aid. There was no provision, express or implied, that as a condition precedent to the receipt of the federal aid a state should surrender any of its powers to protect its own property and to preserve the safety and convenience of the public.

It is unnecessary here to consider the serious constitutional question which would be raised if Congress had attempted, directly or indirectly, to interfere with this reserved power of the state to preserve its own property and protect its own citizens, nor is it necessary to rely upon the rule of construction to be applied in determining whether an act of Congress supersedes, suspends or limits the exercise of the police power of the states. But see in this connection *Reid* v. *Colorado,* 187 U. S. 137, 148; *Savage* v. *Jones,* 225 U. S. 501, 533; *New York N. H. & H. R. Co.* v. *New York,* 165 U. S. 628; *Missouri P. R. Co.* v. *Larabee Flour Mills Co.,* 211 U. S. 612, 623.

In the case of *Morris* v. *Duby,* 274 U. S. 135, to which frequent reference has heretofore been made, it was contended that by reason of the Federal-aid Act of July 11, 1916, and the amendments thereto, the police power of the state *to restrict the gross weight of trucks* using the federal-aid roads to 16,500 pounds was in some way superseded or circumscribed, but the court said at page 143:

> "An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary *police power to conserve the highways* in the interest of the public and to prescribe such reasonable

regulations for their use as may be wise *to prevent injury and damage to them.*"

However, the lower court has, we submit, construed certain language used by the court in the opinion in that case, and in two prior decisions, namely, *Buck* v. *Kuykendall*, 267 U. S. 307, and *Bush & Sons* v. *Maloy*, 267 U. S. 317, and in the latter case of *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, to mean that the Highway Act in some way restricts the state in the exercise of its police power—a construction which is not only not justified by *Morris* v. *Duby*, but is directly in the teeth of the court's discussion and decision in that case of questions almost identical with those of the case at bar.

To make this clear, a brief consideration of the above-mentioned cases is necessary.

The facts in the case of *Buck* v. *Kuykendall*, 267 U. S. 306, were as follows: An operator of an auto stage line in interstate commerce over a federal-aid highway was denied a certificate of public convenience and necessity by the authorities of the State of Washington on the ground that the territory was already adequately served by other carriers. This court held that the refusal of the certificate to applicant, after certificates had been granted to other operators, was a *regulation of the business of the carrier*, amounted to a determination of the persons by whom the highways might be used in interstate commerce, was a prohibition of competition, and *hence was a discrimination against interstate commerce*, and said at page 316:

"Such action is forbidden by the commerce clause." The court added the following:

> "It also defeats the purpose of Congress expressed in the legislation giving Federal aid for the construction of interstate highways."

In other words, it in effect held that the Federal Highway Act merely made explicit the implied prohibition against discrimination contained in the Commerce Clause.

On the same day the opinion in *Bush & Sons* v. *Maloy,* 267 U. S. 317, was announced. In that case the facts were substantially the same as in the preceding case, except that the highways which the operator proposed to use were *not constructed or improved with federal aid.* The Court held that *this fact made no difference,* and that the effect of the commerce clause alone prevented a state from discriminating between interstate motor operators in the matter of granting certificates. Having reached this conclusion, the Court showed there was no distinction between Federal-aid highways and other state highways when it said with respect to the Federal-aid legislation at page 324:

> "The Federal-aid legislation is of significance, *not because of the aid given by the United States for the construction of particular highways,* but because those acts make clear the purpose of Congress that *state highways shall be opened to interstate commerce.*"

As will be later shown, the subsequent decisions of the Supreme Court have sharply confined the expression "shall be opened to interstate commerce" to the facts of the case in which it was used, namely, to situations where a *state action discriminated against interstate commerce.*

In 1927, two years after the decisions in *Bush & Sons* v. *Maloy* and *Buck* v. *Kuykendall,* the opinion in *Morris* v. *Duby,* 274 U. S. 135, was rendered. As has already been pointed out, in this case the court held that the Federal Highway Act neither expressly nor impliedly interfered with the power of the states to enact uniform regulations for the promotion of safety upon the highways and the conservation of their use, cited the case of *Buck* v. *Kuykendall* as authority for the proposition that "the state may not discriminate against interstate commerce," and held that, notwithstanding the Federal Highway Act, *"conserving limitation is something that must rest with the road supervising authorities of the state."*

In the later decision of *Stephenson* v. *Binford,* 287 U. S. 251, 266, it was expressly stated that the decisions in the Buck and Bush cases were based upon *discriminations relating to interstate commerce.*

In 1933 the opinion in *Bradley* v. *Public Utilities Commission,* 289 U. S. 92, was rendered. In that case the Public Utilities Commission of Ohio had denied a certificate of convenience and necessity to a motor carrier engaged in interstate commerce over a designated route on the ground that the route specified was already congested by motor traffic and that the appli-

cant's proposed service would endanger the safety of travellers and property upon the highways. The plaintiffs in that case relied upon the rule announced in *Buck* v. *Kuykendall* and *Bush & Sons* v. *Maloy*. But at page 95 the court distinguished those cases on the ground that those decisions rested upon the fact that *a discrimination in the regulation of the business of the interstate carriers* was there involved, and further said with respect to those cases:

> "The test employed was the *adequacy of existing transportation facilities;* and since the transportation in question was interstate, denial of the certificate invaded the province of Congress. In the case at bar, the purpose of the denial was to *promote safety; and the test employed was congestion of the highway.* The effect of the denial upon interstate commerce was *merely an incident.*
>
> "Protection against accidents, as against crime, presents ordinarily a local problem. Regulation to ensure safety is an exercise of *the police power.* It is primarily a *state function,* whether the *locus* be private property or the public highways. *Congress has not dealt with the subject*" (95).

In its effort to show that the Federal Act was intended to open the highways of the state to the kind of trucks that the plaintiffs in this case desire to operate regardless of what the state might deem necessary for the protection of its highways and the traveling public, the lower court relied heavily upon a single sentence at the end of the opinion in *Morris* v. *Duby,* which is as follows:

> "Regulation as to the method of use, therefore, necessarily remains with the State and can not be interferred with *unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems* of the Union and to facilitating the carrying of the mails over them" (145).

The lower court construed this to mean that the Federal Highway Act has the effect of invalidating a state statute provided the statute defeats any purpose which the Federal Government or any of its agencies had in mind in making contributions under the act. Carrying out this reasoning, the court then quoted at length from the opinion in *N. C. & St. L. Ry. Co.* v. *Walters,* 294 U. S. 405, 417, in order to show what were the purposes of Congress in enacting the Federal Highway Act and in making contributions thereunder. From the combination of its conclusions as to these two cases, the lower court then concluded, in effect, that one of the purposes of Congress was to open the Federal Aid Highways to the kind of trucks which appellees desired to operate. Accordingly it thereupon decided that the South Carolina Act conflicted with the commerce clause, and hence was invalid in its application to Federal Aid Highways.

To show that we are not over-emphasizing the importance which the lower court attached to the above quoted excerpt from *Morris* v. *Duby,* we call attention to the fact, as shown by the record (R. 98), that the lower court at the outset of the trial quoted that ex-

cerpt and announced that it was the rule under which the case would be tried, and directed that evidence be introduced accordingly. At page 813 of its opinion in 17 F. Supp. the court restated and amplified the portion of the excerpt shown in italics in the above quotation. We submit that the lower court's interpretation of the meaning of this court in the indicated portion of that excerpt is clearly wrong. While the lower court does not say it in so many words, it evidently interprets the above quotation as meaning that if a state regulation defeats the useful purposes of Congress in contributing to road building, that of itself constitutes the degree of unreasonableness that will render the Act void. There is nothing in the language of this court which justifies any such construction. On the contrary, the court definitely states that "regulation as to the method of use, therefore, necessarily remains with the state and cannot be interfered with unless"—then follows the condition when it can be interfered with, and that condition is not that the regulation will defeat the useful purposes mentioned, but that "the regulation is so arbitrary and unreasonable as to defeat," etc. In other words, this condition upon which the action of the state can be interfered with is still dependent upon a showing that the Act is "arbitrary and unreasonable," which is the language uniformly employed in describing an Act which violates the Fourteenth Amendment. Accordingly, there is nothing to support the lower court's implication that if a state regulation defeats the useful purposes of the federal Act it thereby

becomes *ipso facto* arbitrary and unreasonable and hence renders the state Act void.

That we are correctly construing *Morris* v. *Duby,* is proved by the two subsequent decisions, *Sproles* v. *Binford, supra,* and *Bradley* v. *Public Utilities Commission,* 289 U. S. 92.

Sproles v. *Binford* involved, as does the instant case, the validity of a state statute that sought to regulate the size and weight of trucks engaged in interstate as well as intrastate commerce. There the court first found that the Act did not violate the Fourteenth Amendment. It then proceeded to discuss the commerce clause and to interpret *Morris* v. *Duby,* reaffirming the holding that the Federal Highway Act left in the state its "ordinary police power" to preserve its roads and protect its citizens, and to do this by *uniform* regulations applicable to interstate and intrastate vehicles, as follows:

> "Second. The objection to the prescribed limitation as repugnant to the commerce clause is also without merit. The Court, in Morris v. Duby, *supra,* at p. 143, answered a similar objection to the limitation of weight by the following statement, which is applicable here: 'An examination of the acts of Congress discloses *no provision, express or implied, by which there is withheld from the State its ordinary police power to conserve the highways in the interest of the public and to prescribe such reasonable regulations for their use as may be wise to prevent injury and damage to them.* In the absence of national legislation especially covering the subject of interstate commerce, the

State may rightly prescribe *uniform regulations adapted to promote safety upon its highways and the conservation of their use,* applicable alike to vehicles moving *in interstate commerce and those of its own citizens.'* In the instant case, there is no discrimination against interstate commerce and the regulations adopted by the State, assuming them to be otherwise valid, fall within the established principle that in matters admitting of diversity of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act" (pp. 389-390).

So, too, in *Bradley* v. *Public Utilities Commission, supra,* the court briefly reaffirmed the holding of the court in *Morris* v. *Duby* and *Sproles* v. *Binford* in the following conclusive declaration as to the power of a state to enact legislation of the sort here involved, saying:

"The State *may exclude* from the public highways vehicles engaged *exclusively in interstate commerce,* if of a size deemed *dangerous to the public safety,* Morris v. Duby, 274 U. S. 135, 144; Sproles v. Binford, 286 U. S. 374, 389-390."

In conclusion of this discussion of the meaning and effect of the last sentence of *Morris* v. *Duby,* we submit not only that there is no holding that the Federal Highway Act restricted the states' police power, but that the Court held just the contrary, when it said as shown *supra:*

"An examination of the acts of Congress discloses no provision, express or implied, by which there is withheld from the State its ordinary *police power to conserve the highways* in the interest of the public and to prescribe such reasonable regulations for their use as may be wise *to prevent injury and damage to them.*"

Neither did the Court announce any change in the rules of law as to what constitutes arbitrariness and unreasonableness.

The opinion in *Nashville, etc.,* v. *Walters,* 294 U. S. 405, from which the lower court quoted at length (17 F. Supp. 803, 811-812) in order to ascertain the purposes of the Federal Highway Act and of the contributions thereunder, was decided in 1935. The facts in that case were as follows: A statute of the State of Tennessee authorized the State Highway Commission to require the elimination of a particular state highway and railroad grade crossing if, in its judgment, a separation of grades were necessary for the protection of persons traveling on the highway or railroad. Upon the issuance of such an order by the Commission the Act imposed upon the railroad company the obligation to pay one-half of the cost of the separation of the grades. The Commission issued the order and the railroad company attacked its validity by a suit under the due process clause of the 14th amendment, on the ground that "the main purpose of grade separation therefore is now the furtherance of uninterrupted, rapid movement by motor vehicles, * * *. The railroad has ceased to be the prime instrument of danger

and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation" (421). The Appellate Court of Tennessee sustained the order of the Commission without considering the evidence. When it came to this court the only question considered was whether the evidence and the special facts relied upon by the railroad were of such nature that they could not conceivably sustain the railroad company's contention. The Court did not pass upon the *validity* of the order of the Commission, it merely held that *the Supreme Court of the state should have considered the evidence and sent the case back for that purpose.*

It will be noted that there *no question of interference with interstate commerce was involved.* The court did not hold or indicate that the Federal Highway Act, as a matter of law, *restricted the power of the states to protect the public from the danger caused by the operation of railroads across highways.* It summarized the evidence and special facts tending to support the railroad company's contention that the great increase in motor transportation was the cause of the grade separation and that that industry would be the chief beneficiary. In this summary the Court referred to the Federal-aid legislation not as affecting the state's police p er, but as a special fact tending to support the above stated contention of the railroad company. It pointed out at page 417:

"The aim of that legislation is 'a connected system of roads for the whole Nation'; 'to provide

> complete and economical highway transport throughout the nation'; to furnish 'a new means of transportation, no less important to the country as a whole than that offered by the railroads.' "

In support of the statement of "aims," which the court showed by the use of quotation marks was taken from other sources, the court referred in a *note* to the *reports of the Chief of (Federal) Bureau of Public Roads.*

Another "aim" listed in this statement is "to establish 'lines of motor traffic in interstate commerce.' " The authority for this statement was a *message of President Harding to Congress.*

The opinion continues:

> "The immediate interest of the Federal Government is, in part, the national defense as well as the transportation of the mails."

In support of this statement the following appears in the Note to the opinion:

> "See Conference Report on 'Bill to provide that * * * the Secretary of Agriculture on behalf of the United States, shall in certain cases, aid the States in the construction, improvement, and maintenance of roads which may be used in the transportation of interstate commerce, military supplies or postal matter.' * * * Compare Co-ordination of Motor Transportation, 182 I. C. C. 263, 366."

Certainly the fact that one of the reasons for authorizing the Secretary of Agriculture to aid the states

was that Congress recognized that the roads "may be used in the transportation of interstate commerce" did not express *the intention to restrict the exercise of the police power of the states to protect those roads from destruction by interstate trucks.* It must be assumed that if Congress had an intention to assert a power which strikes at the heart of the reserved power of the states, it would express it in the Act itself and in language so clear and explicit that consideration of the grave constitutional issue thereby raised could not be avoided. The opinion continues:

> "The relief of the unemployment incident to the business depression has been the main incentive for highway construction since April 4, 1930—the period in which the highway here in question was undertaken and completed" (417).

The authority for this statement is "Reports of Chief of Bureau of Public Roads."

And, finally, it is said in the opinion:

> "To achieve its purposes, the Federal Government has made large contributions to the cost of the Federal-aid highway system."

Since there is nothing in the Federal Highway Act which even remotely suggests that the Act itself, or the state-aid contributions thereunder, would affect in any way the power of the states to regulate the size and weight of interstate trucks using these highways, the reports to which the court referred would not have been admissible if the statute were being construed for the purpose of ascertaining the effect of the federal

action in superseding state legislation or in circumscribing the exercise of the state police power. *George Van Camp & Sons Co.* v. *American Can Co.*, 278 U. S. 245; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77.

However, if such reports were admissible upon that issue, their bearing would be too remote and indirect from the issues in the instant case to serve any purpose. But there is a report which relates directly to the question in this case. It is the report of the Joint Committee on Federal Aid in the Construction of Post Roads, House Document No. 99, 63rd Congress, 3rd Session. At page 22 of that report it was said:

> "It (Congress) should make careful provision for such administration for the Federal highway participation as will *protect the several states in their right to control their local highway affairs and guard against dictatorship from a Federal Bureau in Washington*" (pp. 22-23).

It is evident that the lower court in the instant case was of the opinion that by combining the excerpt quoted above from the opinion in *Morris* v. *Duby* with the indicated portion of the opinion in the *Walters* Case, there resulted some new rule of law that if the South Carolina statute interfered with the accomplishment of any of the aims, interests or incentives of the federal officials recited in the opinion in the *Walters* Case, the Act should be held to be invalid. Surely a state law may not be held to be invalid because, from the evidence, the court may conclude that the effect

of the law conflicts with the accomplishment of the aims or purposes of the Chief of the Federal Bureau of Federal Roads, or with the views of the Interstate Commerce Commission, or even the President of the United States. A conflicting aim or purpose of Congress of course would not invalidate a state act unless it was clearly expressed in an act of Congress.

But even if the "aims" of the Federal Highway Act were conceded to be those discussed above—and of course, without any declaration, the sensible purpose of the Act was to help the states construct better roads for ordinary purposes—that fact would not restrict the state's police power to regulate the weight and size of trucks using the roads in the absence of specific provisions to that effect. Furthermore, "the intent to supersede the exercise by the *State of its police power* as to matters not covered by the federal legislation is not to be implied unless the latter fairly interpreted *is in actual conflict with the state law.*" *Townsend* v. *Yoemans,* 301 U. S. 441, 454. In this opinion, at page 455, it is also said that in "matters admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act." *Morris* v. *Duby,* 274 U. S. 135, 143, and *Sproles* v. *Binford,* 286 U. S. 374, 390, were cited as *two of the five leading decisions* in support of this proposition and thus, in effect, the Court again made clear what those opinions expressly decided, namely, that *the Federal Highway Act does not restrict or in any wise affect the power of the states to*

enact uniform laws limiting the size and weight of trucks.

If Congress had attempted such regulation of a state's roads—a question which of course does not arise in this case unless this Court should so construe the Federal Highway Act—we respectfully insist that such attempted regulation would be an unconstitutional invasion of the state's rights to determine what sort of roads and bridges it will construct and to prescribe non-discriminatory regulations for preserving them and protecting the traveling public in using them.

In the *Walters* case these aims, incentives and purposes of the various federal officials were material as special facts tending to show the extent of the use of the highways by motor carriers, because that was pertinent to the main issue in that case, whether it was reasonable to require a railroad company to pay one-half of the cost of a highway improvement when its competitors in business would be the chief beneficiaries.

However, in the instant case the great and increasing extent of the use of the highways by commercial motor carriers, instead of showing that the act now in issue was unreasonable, or otherwise invalid, strongly tends to support its validity. The lower court in its opinion did not attempt to analyze or give any independent consideration to the Federal Highway Act. If it had it could not have so thoroughly misconstrued and misapplied the opinions of this court dealing with that Act. It is our belief that this misapprehension of

these opinions is the explanation of the only decision which has come to our attention from any court, either state or federal, holding that, in the absence of discrimination against interstate commerce, a state motor vehicle regulatory law enacted for the preservation of the highways or the protection of public safety and convenience imposed an unreasonable burden upon interstate commerce.

2. By the Enactment of the Motor Carrier Act of 1935 Congress Did Not So Occupy the Field as to Prevent, Restrict, or in Anywise Affect the Exercise of the Power of the State to Enact and Enforce the Statute Regulating the Size and Weight of Motor Trucks.

The Motor Carrier Act of 1935 regulates the *business* of commercial motor carriers and, as the lower court demonstrated in its opinion, *does not regulate,* or authorize the Interstate Commerce Commission to regulate, *the weights and sizes of the motor vehicles* for the protection of the highways, or the public, or for any other purpose (17 F. Supp. 803, 806, *et seq.*). At page 808 the lower court said:

> "To sum up on this feature of the case, we do not think that there is anything in the language or in the history of the act which shows an intention on the part of Congress to regulate the size and weight of vehicles; and it is unreasonable to think that Congress would intend, by vague general language, to clothe the Commission with power to regulate a matter of such difficulty in which detailed regulations had already been prescribed by all of the 48 states, and thereby strike down all

state regulations affecting the matter and leave the subject unregulated until such time as the Commission might act. Our conclusion as to the proper interpretation of the act is supported by the following recent decisions; L. & L. Freight Lines, *et al.,* v. Railroad Commission of Florida D. C. Fla.), 17 F. Supp. 13, 14; Lowe v. Stoutamire, 123 Fla. 135, 166 So. 310; Railroad Comm. v. Southwestern Greyhound Lines (Tex. Civ. App.), 92 S. W. (2d) 296."

From this portion of the decree of the lower court no cross-appeal has been taken.

Since the decision in the instant case the same question has been decided in the same way in the following cases: *Werner Transp. Co.* v. *Hughes,* 19 F. Supp. 425, 432; *Werner Transp. Co.* v. *O'Brien,* District Court of the United States, Southern District of Iowa, Central Division, February, 1937 (Findings of fact and conclusions of law not officially reported); *Houston & North Texas Freight Lines* v. *Phares,* 19 F. Supp. 420.

But notwithstanding its holding that the Motor Carrier Act did not undertake to regulate the size and weight of trucks, the lower court clearly indicated that it did somehow as a law have an affect upon the power of the state, both as an expression of the purpose of Congress that the State highways shall be open and also as a preventive against the interference by the states with the subject "which Congress is regulating" (17 F. Supp. 803, 814).

A somewhat similar contention was made and held to be erroneous in *Missouri Pacific R. Co.* v. *Norwood,* 283 U. S. 249. There it was contended that two Arkansas statutes regulating the size of freight and switching crews were invalid because they were in conflict with the commerce clause of the constitution, and the due process and equal protection clauses of the Fourteenth Amendment, and were also repugnant to the Interstate Commerce Act and to the Railroad Labor Act. At page 256 the court said:

> "In the absence of a *clearly expressed purpose* so to do Congress will not be held to have intended to prevent *the exertion of the police power of the States* for the regulation of the number of men to be employed in such crews. Reid v. Colorado, 187 U. S. 137, 148. Savage v. Jones, 225 U. S. 501, 533. Napier v. Atlantic Coast Line, 272 U. S. 605, 611. Plaintiff, while not claiming the Interstate Commerce Act *in terms* purports to cover that subject, insists that the Act does give the Commission jurisdiction over freight train and switching crews and so excludes the States from that field. It calls attention to a number of provisions of the Act and maintains that under them the Commission is empowered to regulate the 'practice' of carriers in respect of the 'supply of trains' to be provided by any carrier."

After showing that there was nothing in either the purpose of the Act or the meaning of the language used "to suggest that by it Congress intended to supersede state laws like those under consideration," the court continued on pages 257 and 258:

"The plaintiff further supports its contention by the claim that the Commission is authorized to regulate the expenditures of carriers. That claim is based on the provisions of the Act empowering the Commission to regulate rates to be charged and divisions of joint rates and to ascertain rate levels that will yield the fair return provided for. But manifestly there is not similarity between determining what items of expense properly are to be taken into account in calculations made for such purposes and in the prescribing of the number of employees or the compensation to be paid them. We think it very clear that Congress has not prescribed or empowered the Commission to fix the number of men to be employed in train or switching crews.

"No analysis or discussion of the provisions of the Railway Labor Act of 1926 is necessary to show that *it does not conflict* with the Arkansas statutes under consideration."

A similar contention was unsuccessfully made in *Missouri P. R. Co.* v. *Larabee Flour Mills Co.*, 211 U. S. 612, where an Act of Congress furnished a far stronger basis for the contention than does the Motor Carrier Act of 1935. There it was contended that since the Interstate Commerce Act had conferred upon the Interstate Commerce Commission authority to *eliminate discrimination* between shippers, it prevented action by the state to require that all shippers be treated alike in the matter of transfer and return of loaded and unloaded cars between the line of a connecting carrier and the flour mill and elevator of a particular shipper. At page 623 the court said:

"Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce, and a delegation of that control to a commission, *necessarily withdraws from the state all power in respect to regulation of a local character.* This proposition cannot be sustained."

In *Erie Railroad Co.* v. *Board of Public Utility Comrs.,* 254 U. S. 394, an order of the Public Utility Commissioners requiring the railroad company to bear the entire expense of the elimination of a number of grade crossings was sustained notwithstanding the grade crossing elimination would require an expenditure of over $2,000,000 by a company that did not have more than $100,000 available for this purpose. The fact that Congress, by the Interstate Commerce Act, was regulating the business of this carrier was given no weight as a matter of *law* in determining the rule by which the validity of the order should be determined, nor was it given any weight as a matter of *fact* in the application of the rule. The court said at page 411:

"To engage in interstate commerce the railroad must get on to the land; and, to get on to it, *must comply with the conditions imposed by the state for the safety of its citizens* * * * If the burdens imposed are so great that the road cannot be run at a profit, *it can stop, whatever the misfortunes the stopping may produce.*"

It should be remembered in this connection that these requirements which the Supreme Court sustained

applied to a railroad company which operated its trains over roadways not furnished by the state, but furnished and maintained by the company at its own cost.

See, also, *Vanddlia R. R. Co.* v. *Public Service Commission,* 242 U. S. 255; *Southern Ry. Co.* v. *King,* 217 U. S. 524; *Penna. R. R. Co.* v. *Hughes,* 191 U. S. 477; *Carey* v. *South Dakota,* 250 U. S. 118, 123; *N. W. Bell Tel. Co.* v. *Nebraska S. R. Comm.,* 297 U. S. 471; *Hartford Accident & Indemnity Co.* v. *Illinois,* 298 U. S. 155, 158; *Townsend* v. *Yoemans,* 301 U. S. 441.

A fortiori is the same principle equally relevant as applied to the supersize trucks. Since there was no prohibition of all trucks from a certain section of the country, the principle of the decision in *Hannibal & St. J. R. Co.* v. *Husen,* 95 U. S. 465, upon which the lower court relied, is inapplicable.

Whether or not the Motor Carrier Act of 1935 supersedes all state statutes regulating the *business* of interstate motor carriers we need not here consider; but it seems clear from reason and authority that the lower court erred in concluding that, because Congress is regulating the *business* of motor carriers engaged in interstate commerce (with no provision, express or implied, for the regulation of the size and weight of trucks) the authority of a state in the exercise of its police power to protect its highways and promote the safety and convenience of the traveling public is thereby more restricted than before the passage of the Federal Act. To summarize: In a case involving the validity of such state action, does a court have any greater right to substitute its judgment for that of the states

legislative body because of the enactment of the Federal Highway Act or the Motor Carrier Act, or both? If not, then the Court's extended discussion of the *effect* of these acts, apparently the main support of its decision, is irrelevant and of no effect.

Respectfully submitted,

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November 10, 1937.

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No. 161

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT ET AL., *Appellants,*

v.

BARNWELL BROTHERS, INC., ET AL., *Appellees.*

BRIEF FOR STATE OF TEXAS AS AMICUS CURIAE

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MOTION OF STATE OF TEXAS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

THE STATE OF TEXAS, by the undersigned, its Attorney General, and Assistant Attorney General, respectfully moves this Honorable Court for leave to file in this case the accompanying brief as *amicus curiae.* The ground of this motion, which is set out more fully in the Preliminary Statement of the brief, is that the State of Texas is vitally interested in the important question of State's rights, which is involved.

We are deeply concerned because of the effect this case may have upon the laws of Texas which at present provide for a net load limit of 7,000 pounds for trucks.

WILLIAM MCCRAW,
Attorney General of Texas.

GEORGE P. KIRKPATRICK,
Assistant Attorney General of Texas.

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I.

Preliminary Statement.

The opinion of the court below is officially reported in *Barnwell Brothers, Inc. et al. v. South Carolina State Highway Department et al.*, 17 Fed. Supp. 803.

The bill of complaint was filed by certain shippers and by certain motor carriers engaged in truck transportation for compensation over South Carolina highways in interstate commerce assailing a statute of that State imposing restrictions upon the size and weight of motor trucks. The District Court of the United States for the Eastern District of South Carolina held that the statute imposed an unreasonable burden upon interstate commerce when applied to commercial trucks operating in interstate

commerce upon certain designated highways and other "standard concrete highways," and authorized an injunction against the enforcement of the size and weight restrictions against such trucks operating upon such highways.

Almost immediately after the lower court's decision was announced in this case, hereinafter referred to as the "South Carolina case," a bill of complaint was filed in the United States District Court for the Northern District of Texas by certain motor carriers for hire engaged in interstate commerce attacking Sections 5 and 5-b of Article 827-A of the Penal Code of Texas, which became effective January 1, 1932, and which prohibits the transportation of a net truck load of more than 7,000 pounds over the highways of Texas. The style of that case is *Houston and North Texas Motor Freight Lines et al. v. L. G. Phares et al.,* 19 Fed. Supp. 420, decided May 14, 1937. Although the bill of complaint in the Texas case followed closely the bill of complaint and the opinion of the lower court in the *South Carolina case, the* United States District Court for the Northern District of Texas dismissed complainant's bill. The decision was not appealed.

II.

The State of Texas Is Interested in Preserving Its Exercise of Police Power in Regulating the Use of Its Highways.

The court in the *South Carolina case* recognized the principle that South Carolina had the right to

prescribe reasonable regulations pertaining to the use of its highways in order to protect and promote the public safety and welfare and to preserve the highways. That right, however, was practically nullified by the court's absolute disregard of the findings of fact presumably made by the legislature of South Carolina when the load limit law was enacted, and by the court's holding in effect that it has the power to substitute its findings for those of the legislature and its exercise of discretion for that of the sovereign State of South Carolina. If such a decision is sustained the future of the highway systems of the several States will rest not with the people whose money has made those systems possible, but will depend upon the ability of astute litigants and counsel to convince the court that it should substitute its judgment for that of the legislature as to the manner and degree that a valid power is to be exercised. The State of Texas is vitally interested in preventing such a result.

As of December 31, 1935, it was estimated by the American Association of State Highway Officials, April, 1936, that there was a total of 220,643 miles of rural highways in Texas, 20,461 miles (record of U. S. Bureau of Public Roads) of which are included in the State Highway System. For the year 1935 there were 1,382,104 motor vehicles registered in the State of Texas (record of U. S. Bureau of Public Roads), giving 6.3 motor vehicles per mile of rural highways, and 67.5 motor vehicles per mile of rural highways in the State Highway System. The latter figure varies for the different States

from 7.1 in Nevada to 455.1 in New Jersey. The decision in the *South Carolina case* emphasizes what various States have done in the matter of regulation of the use of the highways, and leans toward adoption by the court, in utter disregard of legislative discretion and prorogative, of an engineering formula relating to a static wheel load to apply indiscriminately to all States. The unfairness of such a trend is obvious. At the present time the construction and maintenance of State highway systems is largely dependent upon funds received from motor vehicle taxes. The wide disparity between the States in the number of motor vehicles per mile renders it impossible to create through taxation an equal ability to build and maintain roads. The same inability is likewise brought about by the equally wide variance in population and wealth in the States per mile of highway.

In the *South Carolina case* the court comments at length upon the Federal aid which has been granted State highway departments. The Texas State Highway Department was created in 1917. Its records reflect that through August 31, 1935, it has actually spent $383,627,213 on the State Highway System. That figure does not include the many millions of dollars spent by counties on those same roads before they were incorporated in the State Highway System. The first grant of Federal aid was made to Texas in 1918. The total of those grants through August 31, 1935, is $91,416,630. That figure loses its significance when it is considered that it represents less than the amount taken by the Federal

government from the people of Texas through excise taxes on gasoline, tires, and lubricating oils, all products regarded as legitimate objects of taxation in order to provide funds for highway construction and maintenance. For example, the Federal tax of 1c per gallon on gasoline yielded $8,190,922 in Texas during the year 1935. There is no basis either in law or in fact for the assumption that grants of Federal aid to the Highway Department of Texas have purchased the right of way for interstate trucks over the Texas highways. Such a conclusion was at least hinted at in the *South Carolina case* with reference to South Carolina highways.

The court's decision has nullified the load limit law as to certain highways, and left it effective as to others. That action is calculated to develop an increased use of the best highways by a class of traffic, to-wit, exceedingly heavy trucks, which constitutes a grave menace to the safety of other members of the public using those highways. The largest and heaviest trucks, and consequently the most inimicable to public safety and the most detrimental to the highways, would be concentrated on the best highways. The members of the public generally will be forced to choose between abandoning the use of the best highways or assuming the risks incident to their use with the concentration thereon of all of the most dangerous traffic in the entire State. Thus to enable a few to profit the great majority of the public would be penalized for having spent large sums of money to construct the best types of highways.

In the *South Carolina case* the court appears to

overlook entirely the fact that the gross weight limit law was made applicable to all of the highways in the State, and that its reasonableness should not be made to depend solely upon its application to a particular highway. If the load limit law is reasonable when applied to the entire highway system of the State, it should not be stricken either in whole or in part by the fact that a small percentage of the highways may be capable of sustaining a greater weight. This is true first because the load limitation is designed as much to protect life and public safety as it is to preserve the highways, and second, if public regulations and restrictions must vary so as to conform with mathematical exactness to the potential carrying capacities of each type of construction, having due regard for both surface and subsurface conditions, the problem of enforcement would be so great as to amount to a practical nullification of this exercise of the police power. For instance, in Texas the records of the Maintenance Section of the Texas State Highway Department show that in January, 1937, the following general types of highways were included in the system of State highways:

Type	*Miles*
Earth	5,100
Gravel and shell	1,137
Bituminous top (varying from 3/8 inch to 1½ inches thick)	7,840
Asphalt top	2,107
Concrete	4,703
Portion through cities	550

The subsurface conditions present innumerable variations and frequently every type of construction will be found on a single State highway. There is only one highway in Texas, namely National Highway No. 75 from the Red River to Galveston, which consists of concrete construction or its equivalent (brick) throughout, but even here the width of 18 feet over long portions thereof renders this highway unsafe for the general public. In many instances the width of a single highway will present wide variation in a relatively short distance.

It was only a few years ago *after* the highways of Texas had been deluged with cotton trucks transporting hundreds of thousands of bales of cotton that the people of Texas wrote the present 7,000 pound net load limit law on the statute books of this State. It is noteworthy that the 7,000-pound net load limit law was not enacted until *after* the citizens of Texas had seen some of their best highways severely damaged, worn out and destroyed by commercial trucks. They had also experienced the inconveniences, congestion, hazards and dangers as a result of the inordinate use of their highways by motor trucks moving large and heavy loads of freight.

The 7,000-pound net load limit law of Texas, applicable to trucks engaged in both interstate and intrastate commerce, was sustained by this court in *Sproles v. Binford,* 286 U. S. 374, decided May 23, 1932. Not only has Texas sought to protect the life and limb and insure the safety of its citizens, and in so doing conserve and protect its highways, by

means of a net load limit for trucks, but by reasonable regulation, applicable alike to commercial trucks engaged both in interstate and intrastate commerce, this State has controlled the use of its highways, and the number of such motor trucks operating over its highways. These laws have been challenged and sustained by this honorable court. *Stephenson v. Binford,* 287 U. S. 251; *Wald Transfer & Storage Company v. Smith,* 4 Fed. Supp. 61, affirmed 290 U. S. 596.

In *Stephenson v. Binford, supra,* this court made a comprehensive review of the Texas Motor Carrier laws, and said:

> "The Texas Statute, on the contrary, rests definitely upon the policy of highway conservation * * * ."

In *New-Way Lumber Company v. Smith,* 96 S. W. (2d) 282, decided July 15, 1936, the Supreme Court of Texas, referring to the Motor Carrier Laws of Texas, said that the dominant purpose of the laws is the safety of the public from injury and loss of life through the operation of motor vehicles on the public highways. The court further stated that these laws have for their reasonable purpose the protection of the highways. Even with the present restrictive truck laws in full force and effect in Texas, yet according to a tabulation contained in "1935 Texas Highway Taxes and Truck Accidents," made and published by the Railway and Express Employees Association of Texas, there were, during this one year, 2,480 truck accidents in Texas, in

which 572 persons were killed and 3,327 injured. The same publication contains the following statistical data with reference to accidents involving motor trucks on Texas highways:

	1932	1933	1934	1935
Number of accidents recorded	717	1487	1701	2480
Number of people killed	241	362	515	572
Number of people injured	887	1972	2314	3327

Data showing the following has been collected from authoritative sources to be included in the 1936 edition of the same publication:

Class	Number of Vehicles	—People Killed— Total	Per 1000 Vehicles
All motor vehicles	1,474,302	1,974	1-1/3
All motor trucks	284,829	576	2
Regulated motor trucks for hire	4,111	32	7-3/4

If all Texas motor vehicles had killed at the same rate as all regulated trucks for hire, Texas Highway deaths would have been 11,470 instead of 1,975 for 1936. Are the lives of Texas citizens to be further endangered through the use of their highways by larger and heavier trucks operating for hire because a court, by looking with favor on a certain engineering formula as applied to a particular type of highway construction, overturns the exercise of legislative discretion and judgment based on an intimate knowledge of the facts and a bitter experience of the people? The interest of Texas in this Hon-

orable Court's decision in the *South Carolina case* is manifest.

Since other briefs filed herein contesting the propriety of the decision contain thorough discussions of the evidence in the *South Carolina case* and of the relation of the court's findings to the evidence, we shall make but brief mention of those matters. And as the lower court very properly held that the Federal government has not attempted to regulate the size and weight limitations per truck, we will also omit any discussion of that question.

The broad constitutional question presented is whether a Federal court can enjoin the exercise of police power by a State in a field where that power is conceded, simply by finding that a different exercise of the police power, in the opinion of the court, would have been more prudent, and without having before it evidence which conclusively proves that there is no possible basis upon which the exercise of police power could be sustained as reasonably necessary to effect the purpose sought to be accomplished. In other words, where the evidence is conflicting and the attendant presumptions in favor of a proper exercise of the police power by the legislature of a State are not conclusively rebutted, can a Federal court substitute its findings for those of the legislature and thus nullify a State statute pertaining to a matter over which the State has the exclusive right to legislate within constitutional limits?

All italics appearing herein are ours.

III.

BRIEF SUMMARY OF ARGUMENT

1. Since it is conceded that the State has the exclusive right, within constitutional limits, to prescribe regulations pertaining to the use of its highways for the purpose of protecting life and safety and preserving the highways, every reasonable presumption will be indulged that a particular regulation prescribed by a State is reasonably necessary to attain the result sought to be accomplished; and this presumption continues until a complainant conclusively rebuts it by bringing forward evidence to show there is no conceivable basis upon which the regulation can find support. A judicial finding of unreasonableness based on conflicting or inconclusive evidence is an invasion by the judiciary of the fact finding function of the legislature. If there be doubt as to the existence of reasonable factual support for the legislative finding, it must stand. *Corporation Commission v. Lowe,* 281 U. S. 431, 438; *Pacific States Box and Basket Company v. White,* 296 U. S. 176, 185; *O'Gorman & Young v. Hartford Fire Insurance Co.,* 282 U. S. 251, 257, 258.

2. Reasonable restrictions imposed by a State upon the use of its highways, applicable alike to both intrastate and interstate motor vehicles, cannot be set aside merely because a Federal Court, on conflicting evidence, reaches a conclusion different from that reached by the State Legislature, or because an enforcement of the regulation would prove financially burdensome to truck owners operating

motor vehicles for hire over the highways in interstate commerce, and to certain business interests in the State. *Raft v. Van Deman & Louis Company,* 240 U. S. 342, 357; *Hebe Company v. Shaw,* 248 U. S. 297, 303; *Standard Oil Company v. Maryville,* 279 U. S. 582, 586; *O'Gorman & Young v. Hartford Fire Insurance Company,* 282 U. S. 251; *Morris v. Duby,* 274 U. S. 135, 144; *Sproles v. Binford,* 286 U. S. 374, 388 and 399, and *Bayside Fish Flour Company v. Gentry,* 297 U. S. 422, 427, 428.

3. So long as the regulation by a State of the use of its highways finds some reasonable support either in the evidence or the presumptions favoring its validity, it is immaterial that the regulations of a majority of the other States differ in degree, or that national organizations, primarily interested in uniformity of regulation and not in protecting life or safety in a particular State or preserving the highways of that State, recommend a different regulation. *Sproles v. Binford,* 286 U. S. 374, 390 and cases there cited.

4. One of the justifiable purposes of the South Carolina Weight Limit Law, as announced by the legislature, is to "permit the highways to be used freely and safely by the traveling public," in that connection it being found by the legislature that "heavy motor trucks * * * endanger the safety and lives of the traveling public." In addition to common experience, of which courts take judicial knowledge, and the legislative finding, the reasonableness of which has not been conclusively negatived, there is ample evidence in the record to war-

rant a reasonable mind in reaching the conclusion that the South Carolina Weight Limit Law is reasonably necessary to afford adequate protection to the safety and lives of members of the traveling public. Under such circumstances the court has no alternative but to sustain the law. *Buck v. Kuykendall,* 267 U. S. 307, 315; *Sproles v. Binford,* 286 U. S. 374, 385; *Continental Baking Company v. Woodring,* 286 U. S. 352, 364; *Bradley v. Public Utilities Commission of Ohio,* 289 U. S. 92, 96; *Daniel v. John P. Nutt Company,* 185 S. E. 25, certiorari denied, 297 U. S. 724, and *Sage v. Baldwin,* 55 F. (2d) 968, 969.

5. The lower court's twenty-third finding of fact that modern type vehicles engaged in interstate commerce are safer on the highways than overloaded light trucks forms no basis for its further finding that a gross weight limit of 20,000 pounds has no reasonable relation to the protection of the lives and safety of members of the traveling public. Overloaded light trucks may be equally dangerous, less dangerous, or more dangerous than the heavier trucks, yet a police regulation cannot be stricken because it is not all-embracing and does not attempt to prevent every existing evil. If the Legislature of South Carolina finds that the overloaded light truck constitutes an undue menace, presumably appropriate regulation will be provided. In the meantime every danger to the traveling public should not be given free rein because possibly one has been overlooked. *Euclid v. Ambler Realty Co.,* 272 U. S. 365; *Purity Extract & Tonic Co. v. Lynch,* 226 U. S.

192; *Silz v. Hesterberg,* 211 U. S. 31; *James-Dickson Company v. Harry,* 273 U. S. 119, 125; and *Holyoke Water Power Co. v. American Writing Paper Co.,* 300 U. S. 324.

6. State statutes limiting the size and weight of motor vehicles, equally uniform in their application to interstate and intrastate commerce, do not unreasonably burden interstate commerce or otherwise violate the Constitution. *Morris v. Duby,* 274 U. S. 135; *Sproles v. Binford,* 286 U. S. 374; *Houston & North Texas Motor Freight Lines v. Phares,* 19 F. Supp. 420; *Werner Transportation Co. v. Hughes,* 19 F. Supp. 425.

7. If the regulation of the size and weight of the motor vehicles using the highways has any reasonable relation to either safety or preserving the highways, it is immaterial that the regulation does not conform with precise mathematical exactness to the very least restriction which might serve the purposes sought to be accomplished. *Sproles v. Binford, supra,* 388; *Bunting v. Oregon,* 243 U. S. 426, 437, 438; *Hebe Co. v. Shaw,* 248 U. S. 297, 303; *Everard's Breweries v. Day,* 265 U. S. 545, 559; *Hicklin v. Coney,* 290 U. S. 169, 173; and *Bayside Fish Flour Co. v. Gentry,* 297 U. S. 422, 427, 428.

8. By adopting a weight formula based on static wheel load in determining the gross weight which a particular type of pavement can successfully withstand, the court has fallen into error in that it is a matter of common knowledge that the stress and strain on highways is determined by running wheel

loads which vary under driving conditions, and not by static wheel loads. The only limitation which can be placed on running wheel loads is a restriction of the gross weight because under certain conditions of operation practically the entire gross weight will be borne by one wheel. Consequently, a limitation of 20,000 pounds gross weight would frequently mean a wheel load of much more than 8000 to 9000 pounds, which seems to represent, under the court's seventeenth finding of fact, the weight which the standard pavement can be reasonably expected to bear. In any event, the determination of this engineering controversy was for the legislature. *Werner Transportation Co. v. Hughes,* 19 F. Supp. 425, decided June 18, 1937.

9. To be valid it is not necessary that a State fix different weights and sizes for trucks transporting property over each separate road, and/or part thereof, in the State, it being sufficient if the restriction, bearing in mind all the types, kinds, and widths of pavements, subsurface conditions and bridges, has a reasonable relation to protecting safety and preserving the highways. *Sproles v. Binford,* 286 U. S. 374, and see authorities referred to under paragraph 5 above. If the requirement was otherwise, each type of construction, each variance in width, and each change of subsurface conditions would necessitate a different restriction. Under such conditions, it is manifest that the difficulties of enforcement would amount to a practical nullification of all restrictions.

IV.

ARGUMENT

The South Carolina statute imposing size and weight restrictions is a reasonable exercise of the State's police power as applied to trucks transporting property over all the highways of that State, and the width and weight limitations have a reasonable relation to the protection of life and limb and highway conservation, and no unreasonable burden is placed upon interstate commerce.

The South Carolina Act was directed not primarily at the use of the highways by a particular carrier, but at the use thereof by carriers of property generally, and for the sole purpose of protecting the safety of persons having the primary right to use the highways and to preserve the highways for their primary uses. This dual purpose of highway protection and conservation, and the promotion of public safety is clearly shown by the Act itself (South Carolina Statutes at Large of 1933, page 341), a portion of which is as follows:

> "PUBLIC POLICY.—Be It Enacted by the General Assembly of the State of South Carolina: It is hereby declared to be the public policy of this State that heavy motor trucks, alone or in combination with other trucks, increase the cost of highway construction and maintenance, interfere with and limit the use of the highways for normal traffic thereon, and endanger the safety and lives of the traveling public, and that the regulations embodied in this act are necessary to achieve economy in highway costs, and to permit the highways to

be used freely and safely by the traveling public."

The declaration of policy contained in the Act, in the light of which *every word* in the Act must be read, leaves no doubt that the *object* of the law is legitimate. The means adopted by South Carolina to accomplish the legitimate end in view are not prohibited, but in principle have been expressly approved by this court.

There are approximately 60,000 miles of roads of all kinds in South Carolina. The lower court sustained the validity of the size and weight limitations as applicable to about 57,500 miles, or 96 per cent of all the roads, but denied the validity of the limitations as applied to trucks operating over some 2,400 miles of highway, or 4 per cent of the total mileage of the State. The lower court found that within the 2,400 miles there were certain weak links, including bridges and city streets, which could not support the heavier trucks without damage.

The highways and roads of South Carolina are not uniform in width; they vary in strength and construction from dirt roads to concrete pavement, and even in the case of the best concrete pavement the subgrade is not of the same strength at all times, changing with weather conditions, floods and frosts, and varying in different parts of the State and on different stretches of a particular road or highway. There is also a wide variation in the width and strength of the bridges of the State, as well as the city streets. It appears from the lower court's

opinion that there are no connected continuous highways through the State which, including bridges and city streets, have a strength designed to withstand gross load limits in excess of 20,000 pounds.

Respecting width limitations, it will be noted that South Carolina's regulation would have been sustained if a width of six additional inches had been allowed, that is, if a truck width of eight feet had been permitted instead of seven and one-half feet. With regard to weight limitations, it seems clear that the court would have upheld the Act if, instead of the 20,000 pound gross weight restriction, it had conformed to a suggested engineering or mathematical formula, which gives consideration solely to wheel load as distinguished from gross weight. Under the court's formula it would appear that the weight can be increased indefinitely by increasing the number of wheels. In a subsequent portion of this brief we point out that wheel load varies under running conditions, and the only effective limitation on wheel load is a limitation on gross weight.

There is a presumption that a State police statute is valid, and any doubt must be resolved in favor of the legislative enactment.

There is a presumption that a State in enforcing its local policies conforms to all Constitutional requirements. It is elementary that every doubt must be resolved in favor of the validity of any Act of a State legislature. Since it is conceded the State has exclusive right, within Constitutional limits,

to prescribe regulations pertaining to the use of its highways for the purpose of protecting life and safety and preserving the highways, every reasonable presumption will be indulged that a particular regulation prescribed by a State is reasonably necessary to attain the result sought to be accomplished. Such a regulation will be sustained if from the evidence reasonable minds could differ as to the reasonableness and necessity therefor, or if all of the presumptions in favor of a Constitutional exercise of the police power by the legislature in prescribing the regulations are not conclusively rebutted. *Corporation Commission v. Lowe,* 281 U. S. 431, 438; *Pacific States Box & Basket Company v. White,* 296 U. S. 176. In the latter case there was involved the validity of a State police measure, and this court said (p. 185):

> "The order here in question deals with a subject clearly within the scope of the police power. See Turner v. Maryland, 107 U. S. 38. When such legislative action 'is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noted, or to other legitimate proof, that the action is arbitrary."

Since the evidence as to the reasonableness of the size and weight limitations is sharply conflicting, the statute must be sustained.

It is clear that the court below improperly undertook to weigh all the evidence, and then substituted its personal opinion for the judgment of the South Carolina legislature. It is well settled that if there is any basis whatsoever for the legislative enactment the court is precluded from interfering.

The court may take judicial notice of what is common knowledge, namely, that size and weight limitations for trucks promote public safety and highway conservation. However, it is not necessary to depend solely upon judicial notice in this case, as several expert witnesses testified that the size and weight limitations of the statute have an important bearing upon accidents and the protection of life, limb and public safety.

Mr. Clifford Older, one of the foremost engineers of the United States, testified that "the weight of a vehicle has a direct relation to its danger or safety," and that "the heavier the vehicle the more destruction it is capable of causing if it is in an accident." This witness further testified that the danger becomes greater as the length and width of the vehicle increases (Tr. 240, 241, 242).

Mr. J. S. Williamson, Chief Engineer of the South Carolina Highway Commission, testified that there are fifty miles of bridges in the State highway system, and about 75 per cent of that mileage was designed to carry a load not in excess of ten tons (Tr.

174); that although most of South Carolina's concrete pavement is 18 feet in width, over 100 miles is only 16 feet wide, and one little stretch in Sumpter County is only 9 feet wide (Tr. 177, 179). This witness further testified that many cities and towns of the State have streets which are very narrow; that at intersections a car and a long truck would have difficulty passing; and that a long truck would also experience some difficulty in turning corners (Tr. 178).

The statistics given in the preliminary part of this brief show the experience in Texas has been that accidents and loss of life increase in a more or less direct proportion to the size and weight of trucks.

The foregoing demonstrates that the evidence in the record is conflicting. Eminent authorities entertain the opinion that the size and weight limitations have a reasonable relation to the protection of life, limb and public safety. The well established rule, applicable here, was recently applied by this court in *Old Dearborn Distributing Company v. Seagram-Distillers Corporation,* 299 U. S. 183. In sustaining an Illinois statute, the court said (196):

> "We need say no more than that the question may be regarded as fairly open to difference of opinion. * * * Where the question of what the facts establish is a fairly debatable one, we accept and carry into effect the opinion of the legislature. Radice v. New York, 264 U. S. 292, 294; Zahn v. Board of Public Works, 274 U. S. 325, 328, and cases cited."

That the lower court erred, in view of the sharply

conflicting evidence and differences of opinion, in substituting its finding for that of the legislature, is also borne out by the following cases: *Raft v. Van Deman & Lewis Company,* 240 U. S. 342, 357; *Hebe Company v. Shaw,* 248 U. S. 297, 303; *Standard Oil Company v. Maryville,* 279 U. S. 582, 586; *O'Gorman & Young v. Hartford Fire Insurance Company,* 282 U. S. 251, 257, 258; *Sproles v. Binford,* 286 U. S. 374, 388, 399; *Bayside Fish Flour Co. v. Gentry,* 297 U. S. 422; and *New York, New Haven & Hartford Railroad Company v. New York,* 165 U. S. 628, 631, 632.

This Honorable Court has repeatedly recognized, and will take judicial notice of the fact, that "these powerful and speedy trucks are the *menace* of the highways," and that the movement of vehicles over the highways is attended by constant and serious danger to the public. *Continental Baking Co. v. Woodring,* 286 U. S. 352, 364, 366. That highway hazards increase with the increase in the number and size of the vehicles, and that the exclusion of the larger and heavier vehicles promotes safety has been expressly recognized by this court. *Morris v. Duby,* 274 U. S. 135, quoting at pages 143, 144 from *Buck v. Kuykendall,* 267 U. S. 307, 315; *Sproles v. Binford,* 286 U. S. 374, 385.

The State of South Carolina has done here precisely what this Honorable Court said that a State might do. *Buck v. Kuykendall,* 267 U. S. 307; *Bradley v. Public Utilities Commission,* 289 U. S. 92. In *Buck v. Kuykendall, supra,* the court said (314):

"The highways belong to the State. It may

make provision appropriate for securing the safety and convenience of the public in the use of them. Kane v. New Jersey, 242 U. S. 160."

and also (315):

"With the increase in the number and size of the vehicles used upon a highway, both the danger and the wear and tear grow. To exclude unnecessary vehicles — particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject."

In *Bradley v. Public Utilities Commission of Ohio, supra,* this court said (95):

"The State may exclude from the public highways vehicles engaged exclusively in interstate commerce if of a size *deemed* dangerous to the public safety."

One of the justifiable purposes of the South Carolina size and weight limit law, as announced by the legislature, is to "permit the highways to be used freely and safely by the traveling public," in that connection it being found by the legislature that "heavy trucks * * * endanger the safety and lives of the traveling public."

South Carolina *deemed* excessively large and heavy trucks dangerous to life and limb, and it has promulgated appropriate regulation designed to securing the safety and convenience of the public. In its opinion the lower court states that "it is true

that the enforcement of the provisions of the statute would probably reduce traffic on the highways to the extent that it would greatly reduce the amount of long distance hauling by truck." * * * Numerous decisions of this and other courts remove any doubt that the exclusion of trucks from the highways promotes the protection of life and limb.

Since every presumption must be indulged in favor of the validity of the legislative enactment and as there is substantial evidence in the record that the size and weight limitations promote safety and protect life and limb, and as this Honorable Court and numerous other courts have repeatedly recognized and taken judicial notice that means similar to those adopted by South Carolina constitute an appropriate exercise of the police power to accomplish the legitimate end of public safety, it was manifest error for the court below to substitute its opinion for the judgment of the legislature. The legislature of South Carolina would be derelict in its duty if it failed to make every reasonable effort to protect the life and safety of the citizens of that State. Although the lower court gave scant consideration to this aspect of the case, it is obvious from the standpoint of public safety alone and irrespective of the necessities of highway conservation, that the size and weight limitations must be sustained.

The Size and Weight Limitations Have a Reasonable Relation to Both Public Safety and Highway Conservation and Such Restrictions Do Not Place an Undue Burden on Interstate Commerce.

The validity of the South Carolina statute now under review was sustained by the Supreme Court of South Carolina in *Daniel v. John P. Nutt Company*, 185 S. E. 25, certiorari denied, 297 U. S. 724. In its opinion the State court said:

> "The legislature, however, after due consideration of all the facts and circumstances, concluded that the Act was necessary, first, 'to achieve economy in highway costs' and, second, 'to permit the highways to be used freely and safely by the traveling public.' *That heavy vehicles increase the cost of construction and maintenance of the highways is a fact of common knowledge.* For more than twenty years this State has graduated the license fees of motor vehicles according to their weight. *All know that the danger of a motor vehicle increases with its weight, and that the width and length of motor vehicles bear direct relation to the safety of others using the highways.*"
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> * * *
>
> "*That there is a direct relation between the weight and size of motor vehicles and the consequent damage to the highways resulting from their use, and the consequent danger to others from their operation is no longer open to controversy,* and reasonable regulations in this respect are within the police power and entirely within the legislative domain."

In *Hicklin v. Coney,* 290 U. S. 169, 173, this court recently said:

> "Carrying capacity, the size and weight of trucks, unquestionably have a direct relation to the wear and hazards of the highways."

What was said by the Supreme Court in *New York, New Haven and Hartford Railroad Company v. New York,* 165 U. S. 628, 632, is applicable to the statute under review:

> "We know from the face of the statute that it has a real, substantial relation to an object as to which the State is competent to legislate, namely, the personal security of those who are passengers on cars used within its limits."

In spite of the decisions of this and numerous other courts to the contrary, the lower court held that there is no reasonable relation between the means and the end, that is, that the particular limitations of size and weight have no reasonable relation to either public safety or the preservation of the highways, and consequently place an undue burden on interstate commerce. This honorable court has decided definitely that State statutes limiting the size and weight of motor trucks, equally uniform in their application to interstate and intrastate commerce, do not burden interstate commerce or violate the commerce clause of the Constitution. *Sproles v. Binford, supra; Morris v. Duby, supra.* For other recent decisions see *Houston & North Texas Motor Freight Lines v. Phares,* 19 Fed. Supp. 420, decided May 14, 1937; *Werner Transp. Co. v. Hughes,*

19 Fed. Supp. 425; decided June 18, 1937; *Ashland Transfer Co. v. State Tax Commission,* 247 Ky. 144, 56 S. W. (2d) 691, opinion reconsidered and reaffirmed October 29, 1937, by the Court of Appeals of Kentucky in *Whitney v. Fife,* not yet reported; *Continental Baking Co. v. Woodring,* 286 U. S. 352; *Hicklin v. Coney,* 290 U. S. 169; *Hendrick v. Maryland,* 235 U. S. 610; *Bradley Utilities Commission of Ohio,* 289 U. S. 92; *Stephenson v. Binford,* 287 U. S. 251; and *Aero Mayflower Transit Co. v. Georgia Public Service Commission,* 295 U. S. 285.

In *Sproles v. Binford, supra,* the validity of the Texas statute imposing a net load limit of 7,000 lbs. for trucks was upheld against an attack made under the commerce clause. The court said (388, 389):

> "Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. * * * When the subject lies within the police powers of the State, debatable questions as to reasonableness are not for the courts, but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome. Standard Oil Co. v. Marysville, 279 U. S. 582, 586; Price v. Illinois, 238 U. S. 446, 452, 453; Hadacheck v. Los Angeles, 239 U. S. 394, 410; Euclid v. Ambler Realty Co., 272 U. S. 365, 388; Zahn v. Board of Public Works, 274 U. S. 325, 328. Applying this principle, this court, in Morris v. Duby, 274 U. S. 135, sustained the regulation of the Highway Commission of Oregon, imposed under legislative authority, which reduced the combined maximum weight in the case of motor

> trucks from 22,000 lbs., which had been allowed under prior regulations, to 16,500 lbs. See, also, Carley & Hamilton v. Snook, 281 U. S. 66, 73. The requirement in Morris v. Duby, related to the gross load limit, but we know of no constitutional distinction which would make such legislation appropriate, and deny to the State the authority to exercise its discretion in fixing a net load limit."

In *Morris v. Duby, supra,* the court quoted with approval from its opinion in *Buck v. Kuykendall,* 267 U. S. 307, 315:

> "To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy. State regulation of that character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject."

In *Bradley v. Public Utilities Commission of Ohio, supra,* this court held that a State could properly *exclude* from the public highways vehicles engaged exclusively in interstate commerce if of a size deemed dangerous to the *public safety.* Also it was said that "*safety* may require that no additional vehicle be admitted to the highway."

In *Continental Baking Co. v. Woodring,* 286 U. S. 352, 364, the court quoted with approval the following from the District Court's opinion:

> "The highways are being pounded to pieces by these great trucks which, combining weight with speed, are making the problem of maintenance well-nigh insoluble. The legislature

> but voiced the sentiment of the entire State in deciding that those who daily use the highways for commercial purposes should pay an additional tax. Moreover, these powerful and speedy trucks are the menace of the highways."

The court further said (366):

> "Motor vehicles may properly be treated as a special class, because their movement over the highways, as this court has said, 'is attended by constant and serious dangers to the public, and is also abnormally destructive to the ways themselves'."

Though admitting that the size and weight restrictions would exclude some commercial trucks from the highways, thereby accomplishing in part the objects of the statute, yet to justify its conclusion that the restrictions were unreasonable, the lower court made frequent reference to the great and constantly increasing amount of motor traffic upon the 2,400 miles of South Carolina highways. It is a matter of common knowledge that the State or through highways are the most traveled and hence the most congested. An increase in the size of the trucks would itself add to the congestion, and as the unit cost of truck transportation decreases as the size of the pay load increases, a relaxing of the existing limitations would be calculated to attract more trucks to the highways, thus further complicating the problem of congestion. Certainly the frequency of use and congestion upon these highways have a direct bearing upon and relation to

traffic safety and highway protection. In *Sproles v. Binford, supra,* this court said (385):

> " * * * and this increase in 'truck density' justifies the dimensional and weight restrictions of the statute in the interest of public safety and convenience and highway protection."

Also in *Buck v. Kuykendall,* 267 U. S. 307, this court said (315):

> "To exclude unnecessary vehicles—particularly the large ones commonly used by carriers for hire—promotes both safety and economy."

In *Sage v. Baldwin,* 55 F. (2) 968, 969, the District Court said:

> "The exclusion of unnecessary vehicles aids safety and economy * * * ."

Since the existence of an actual, effective, reasonable relation between the means and the end is not open to question, since this court has repeatedly held that the means employed, viz., the size and weight limitations, are appropriate methods of accomplishing the legitimate purposes of the Act, and since it is admitted in the opinion of the lower court that at least one of those purposes would be accomplished by the size and weight restrictions, the decision nullifying those restrictions is indeed startling.

The right of the States to control, by *prohibition* or *permit,* under their police power, the use of their highways by interstate, as well as intrastate, car-

riers, has been recognized by this court. *Bradley v. Public Utilities Commission of Ohio, supra; Wald Storage & Transfer Co. v. Smith,* 4 Fed. Supp. 61, affirmed, *per curiam* opinion, 290 U. S. 596. In sustaining the validity of Texas truck laws requiring authority from the Railroad Commission of Texas before common carrier motor vehicles used in *interstate* commerce could operate over Texas highways, the court said in the *Wald case, supra:*

> "Prior decisions of this court, Sproles v. Binford (D. C.), 52 F. (2d) 730, affirmed 286 U. S. 374, 52 S. Ct. 581, 76 L. Ed. 1167, Stephenson v. Binford (D. C.), 53 F. (2d) 509, affirmed 287 U. S. 267, 53 S. Ct. 181, 77 L. Ed. 288; Sage v. Baldwin (D. C.), 55 F. (2d) 968 (not appealed); C. J. Allen v. Galveston Truck Line Corporation, 53 S. Ct. 694, 77 L. Ed. .....; and the recent decision of the Supreme Court of the United States in line with all of these, C. A. Bradley v. Public Utilities Comm. of Ohio, 53 S. Ct. 577, 77 L. Ed....., decided April 10, 1933, have established the full right of the State to control, by prohibition and permit as to intrastate business and its right also to *control the use* of the public roads by persons desiring to use them for hire as to *interstate business, by prohibition and permit,* in the exercise of police power of the State to promote safety of life and limb, and the convenience of use of the highways for the purpose for which they were primarily designed, as well as for the preservation of the State's property in the roads and their protection against injury and destruction."

If South Carolina, in order to promote safety and

preserve the highways, can prohibit the use of the highways, certainly it is entitled to accomplish the same purposes by a less severe restriction.

A Police Statute of a State May Not Be Set Aside Because Compliance Therewith Is Burdensome.

It is very apparent from the lower court's decision that undue importance was attached to possible financial burdens which the enforcement of the act might impose upon those operating and using excessively large and heavy trucks in interstate commerce. Prospective profits were allowed to outweigh human life and safety and conservation of the highways. The interests of the vast body of tax payers was totally disregarded. Even if compliance with the police regulation would prevent truck and other business interests from making the profits which might be made in the absence of any restriction, that fact does not warrant striking down the Act. The same point was considered in *Morris v. Duby, supra* (at page 144);

> "The mere fact that a truck company may not make a profit unless it can use a truck with a load weighing 22,000 or more pounds does not show that regulation forbidding it is either discriminatory or unreasonable."

In *Sproles v. Binford, supra,* this court said (at pages 388 and 389):

> "When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for

> the legislature, which is entitled to form its own judgment, *and its action within its range of discretion cannot be set aside because compliance is burdensome.*"

In *Houston and North Texas Motor Freight Lines v. Phares,* 19 Fed. Supp. 420, 422, the United States District Court for the Northern District of Texas recently declined to enjoin the enforcement of the 7,000 pounds net load limit law for trucks in Texas, saying:

> "The pleading here discloses, in Sections 15 and 20 of the bill, that the complainants have developed and built up a *prosperous* business under the existing laws."

Since operators in Texas have built up a prosperous business under a law limiting the net load to 7,000 pounds, it would appear that the 20,000 pound gross weight limit law of South Carolina would allow an even wider margin of profit.

Scientific Precision Is Not Required of State Police Statutes

It is clear from the lower court's opinion that it does not approve the specification of gross weight limits for trucks, but favors the use of a formula based on wheel loads as being more nearly accurate in determining the stress and strain that a given type of highway construction can withstand. However, the selection by the court of a formula different from that chosen by the legislature does not consti-

tute a basis for the invalidation by the former of an Act of the latter.

If a State regulation of the size and weight of motor vehicles using the highways has any reasonable relation to safety or preserving the highways, it is immaterial that the regulation does not conform with precise mathematical exactness to the very least restriction which might serve the purpose sought to be accomplished. Nor is scientific precision required of State police regulations. *Sproles v. Binford,* 286 U. S. 374, 388; *Bunting v. Oregon,* 243 U. S. 426, 437, 438; *Hebe Company v. Shaw,* 248 U. S. 297, 303; *Everard's Breweries v. Bay,* 265 U. S. 545, 559; *Hicklin v. Coney,* 290 U. S. 169, 173; and *Bayside Fish Flour Company v. Gentry,* 297 U. S. 422, 427, 428.

In *Sproles v. Binford, supra,* it was urged that the 7,000-pound net load limit law of Texas for trucks was not in accord with sound engineering opinion. The court said (388):

> "Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make *scientific precision* a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure."

The Police Regulation of a State May Not Be Invalidated Because the Restrictions Imposed Differ in Degree from Those of Other States.

With varying highway, financial, traffic and other conditions in the different states it is essential that the power and authority of each State to regulate the use of its highways be and remain unimpaired to the end that special requirements may be imposed which are best calculated to meet local conditions. It is clear from the lower court's opinion that an attempt is being made to force South Carolina to adopt highway regulations substantially identical to those of other states. Such action is unwarranted.

So long as the regulation by a State of the use of its highways finds some reasonable support, either in the evidence, or the presumption favoring its validity, it is immaterial that the regulations of a majority of the other States differ in degree, or that national organizations, primarily interested in unformity of regulations and not in protecting life or safety in a particular State, or preserving the highways of that State, recommend a different regulation. Police regulations of a State are not thus subject to attack. *Sproles v. Binford,* 286 U. S. 374, and cases there cited. In the *Sproles case* this court said (390):

> "In the instant case, there is no discrimination against interstate commerce and the regulations adopted by the State, assuming them to be otherwise valid, fall within the established principle that in matters admitting of diversity

of treatment, according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act. Minnesota Rates cases, 230 U. S. 352, 399, 400. *As this principle maintains essential local authority to meet local needs, it follows that one State cannot establish standards which would derogate from the equal power of other States to make regulations of their own.* See Hendrick v. Maryland, 235 U. S. 610, 622; Kane v. New Jersey, 242 U. S. 160, 167; Michigan Commission v. Duke, 266 U. S. 570, 376; Interstate Busses Corp. v. Blodgett, 276 U. S. 245, 250, 251; Sprout v. South Bend, 277 U. S. 163, 169; Continental Baking Co. v. Woodring, *ante*, p. 352."

The Exercise of the Police Power by a State Need Not Be All-Embracing, Or Cure All Possible Abuses and Evils.

The lower court's twenty-third finding of fact that modern type vehicles engaged in interstate commerce are safer on the highways than overloaded light trucks does not constitute sufficient basis for a finding that a gross weight limit of 20,000 pounds has no reasonable relation to protection of lives and safety of members of the traveling public. Overloaded light trucks may be equally dangerous, less dangerous, or more dangerous than the heavier trucks, yet a police regulation cannot be stricken merely because it is not all-embracing and does not attempt to prevent every existing evil. If the Legislature of South Carolina finds that the overloaded light truck constitutes an undue menace, presumably appro-

priate regulation will be provided. In the meantime, every danger to the traveling public should not be given free rein because possibly one has been overlooked. In *James-Dickinson Company v. Harry*, 273 U. S. 119, this court said (125):

> "It is claimed that the Texas statute violates the equal protection clause of the Fourteenth Amendment because it applies only to fraud in transactions involving the purchase of real estate or of stock in a corporation or joint stock company. The contention is clearly unfounded. *A statute does not violate the equal protection clause merely because it is not all-embracing. Zucht v. King*, 260 U. S. 174, 177. *A State may direct its legislation against what it deems an existing evil, without covering the whole field of possible abuses.*"

The South Carolina Weight Limit Law Applies to All Highways in the State and if Reasonable With Reference to All Those Highways, It Should Not Be Stricken As to 4% of Them Even Though that 4% May Be Capable of Sustaining a Heavier Weight.

Since the statute is reasonable and necessary as a means of protecting all of the highways and bridges in the state, and as a means of promoting safety in their use, the court erred in holding it unreasonable as to a few of the highways merely because the court concluded that those highways were capable of sustaining a greater weight. The lower court sustained the validity of the size and

weight limitations with reference to 57,500 miles of the State's 60,000 miles of roads, or 96 per cent of the total, but denied the validity with reference to 2,400 miles of highway. The court enjoined the enforcement of the Act in so far as operations over the latter mileage are concerned, provided the vehicles do not exceed 96 inches in width. The effect of the order will be to cause a concentration of the largest and heaviest trucks on the best highways in the State. Such trucks are recognized as a menace to safety. As a result of the court's decision, the traveling public in South Carolina must either submit itself to this increased danger or abandon the use of the best highways in the State. So far as the taxpayer is concerned, the court has removed the incentive to build the best type of highway.

We submit that it is not necessary for a State to prescribe different motor truck regulations restricting size and weight for each highway, or part thereof, in the State, and authorizing the use thereon of the maximum size and weight which they reasonably can be expected to bear. If such regulations were attempted, they would be based solely upon the physical potentialities of each type of construction, and would disregard wholly the element of safety. But South Carolina, unlike the lower court, apparently places as high a premium on the lives of its citizens as on financial gain to those using ponderous trucks, and does not want to disregard the element of safety. Under those circumstances a regulation of size and weight is valid which, bearing in

mind all types, kinds and widths of pavement, varying subsurface conditions, mileage through cities and design of the bridges, has a reasonable relation either to protection of safety or preservation of highways throughout the entire State. If the requirement was otherwise, each type of construction, each variance in width, and each change of subsurface conditions would necessitate a different restriction. Under such circumstances it is manifest that the difficulties of enforcement would amount to a practical nullification of all restrictions.

In a number of cases this court has upheld the power of a state legislature to consider a problem of this character in its entirety, and to refuse separate treatment of different classes because of administrative difficulties which might be incurred if such special treatment were provided. In *Aero Mayflower Transit Co. v. Georgia Public Service Commission*, 295 U. S. 285, an interstate motor carrier assailed a statute which imposed a flat fee, alleging that the fee was an unreasonable one, since the carrier made only a limited use of the entire State highway system. In rejecting the contention of the motor carrier the court said (289):

> "The appellant urges the objection that its use of roads in Georgia is less than that by other carrier engaged in local business, yet they pay the same charge. The fee is not for the mileage covered by a vehicle. There would be administrative difficulties in collecting on that basis. The fee is for the privilege of a use as extensive as the carrier wills that it shall be. There is

nothing unreasonable or oppressive in a burden so imposed."

In *Euclid v. Ambler Realty Co.*, 272 U. S. 365, 388, the court stated that "the inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity." See also *Purity Extract and Tonic Company v. Lynch*, 226 U. S. 192; *Silz v. Hesterberg*, 211 U. S. 31; *James-Dickson Company v. Harry*, 273 U. S. 119; and *Holyoke Water Power Company v. American Writing Paper Company*, 300 U. S. 324.

The Lower Court Erred In Adopting Weight Specifications Based on a Static Wheel Load.

The lower court accepted without qualification the proposition urged by the truckers and others having a very definite interest in the use of highways by heavier and larger motor vehicles operated thereon for hire, that "highway stresses are ruled by wheel loads and not by gross loads," and from this premise concluded that gross weights have no reasonable relation to preservation of the highways, or the safety of the public. There is disagreement in the engineering field upon the question whether highway stresses are ruled by wheel loads or by gross weights. It is well known that wheel loads, under actual running conditions, such as going up hills, around curves, traversing irregularities of road surface and shifting of cargo, are constantly changing. Therefore, the specification of a *static wheel load* fails to secure any effective or real regulation.

On the other hand, restriction of the gross weight effectively limits the wheel load under running conditions. It is common knowledge that under actual driving conditions the entire gross weight must, at times, be borne almost entirely by one wheel. Consequently, a limitation of 20,000 pounds gross weight would frequently mean a wheel load of much more than 8000 or 9000 pounds, which seems to represent, under the court's seventeenth finding of fact, the weight which the standard pavement can be reasonably expected to bear.

It is universally accepted that gross weight is the important and controlling consideration in so far as many bridges are concerned. And where varying subgrade conditions exist, and the record shows that such conditions do exist in South Carolina, the many concrete slabs perform to some extent the functions of a bridge. As stated by the District Court in *Werner Transportation Company v. Hughes,* 19 Fed. Supp. 425, 429:

> "Where a weakened subgrade condition exists, the pavement slab performs to some extent the functions of a bridge, in which case the total or gross weight imposed upon the slab determines the stress induced upon the material constituting the slab."

Therefore, the aggregate or gross weight of truck and load under actual running conditions is a matter of prime importance as applied to the general run of concrete highways, some of which have weak and variable subgrade conditions. The same is true with reference to bridges. The court clearly

erred in declining to recognize that gross weight has an important bearing in determining the stress induced upon the material constituting the highway structures. Gross weight also determines the force involved in the event of a collision. Other conditions being equal, that force increases in direct proportion to the square of the speed.

The South Carolina legislature was familiar with the condition of the highways of that State, and there is nothing to impeach the good faith of that legislative body, nor the pronouncements of the Supreme Court of South Carolina which have been referred to herein. Under the circumstances, it was clearly improper for the lower court to substitute its opinion and fact findings for those of the legislature of South Carolina.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 161.

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

v.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.,
Appellees.

MOTION OF THE STATE OF FLORIDA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

THE STATE OF FLORIDA, by the undersigned, its Attorney General, respectfully moves this Honorable Court for leave to file in this case, as *amicus curiae,* the accompanying brief in support of the decree of the District Court.

The grounds for this motion, fully discussed hereafter in the Preface to the brief, are:

First, *the academic interest* of the State of Florida in the affirmance of a decree which preserves those guarantees of the Commerce Clause of the Constitution of the United States which are essential to the welfare of each State and the Nation as a whole, and

Second, *the real and immediate interest* of the State of Florida in the affirmance of a decree which is now in fact protecting the public and private interests of her people from grave injury.

CARY D. LANDIS,
Attorney General of Florida.

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PREFACE TO THE BRIEF,

Statement of the Interest of the State of Florida in the Issues of This Case.

The interest of the State of Florida in the issues now drawn and soon to be orally debated at the bar of this Court, is not merely academic; does not spring alone from her desire that the precedents established and the opinions published by this Court continue to preserve to the States and their peoples the guarantees of the Commerce Clause of the Constitution of the United States. This State is also vitally and immediately concerned in the preservation and continuation of the protection now actually afforded by the District Court's decree to the public and private interests of her people.

The interests of the State of Florida are reflected in the findings and opinion of the District Court:

> "Within the past decade there has been a great development of interstate commerce by truck, and a corresponding change and development of industry in the Southeastern part of the United States based upon truck transportation. The market gardening industry, the textile industry, the fertilizer industry, and many others have changed in large part their method of doing business as a result of the facilities afforded them by the use of trucks in interstate commerce . . .
>
> ". . . A large part of this interstate traffic, with all that it means to the life of the people of the Southeastern part of the United States, will be virtually barred from the highways of South Carolina, and a barrier will be erected not merely against the commerce of the State but *also as against the commerce of sister States* (emphasis added), if these restrictions are enforced (Opinion, R. 65) . . . That the said standard paved roads form a well connected system of highways

> which have been improved with federal funds as a part of a national system; that they comprise the best system of highways in the Southeastern part of the United States, and are capable of carrying the commerce which has been developed by modern truck transportation; that federal highways numbered 1, 15-A, 17, 21, 25, 29 and 52 comprise the great arteries of interstate commerce through the State of South Carolina (Finding of Fact No. 18, R. 81) . . . the great arteries of interstate commerce above referred to carry the larger part of interstate traffic moving to and from the State, as well as such traffic *passing through the State to and from Georgia and Florida and the States to the North"* (Opinion, R. 64) (Emphasis added).

The evidence below was primarily directed to a showing of the burden which the enforcement of the South Carolina regulations would have upon the industry, commerce, and life of the people of South Carolina. This evidence was uncontradicted and the findings of the District Court were not excepted to by appellants. But the extent to which this enforcement will affect the industry, commerce, and life of the peoples of the surrounding States is well within the judicial knowledge of this Court.

The burden of the law will be so far reaching that it will affect all the States of the Union in varying degree; but a consideration of the geographical location of the State of Florida makes it manifest that the burden of the law will fall most heavily upon her people. The territorial expanse of South Carolina lies athwart the trunk arteries of interstate commerce which parallel the Atlantic Seaboard. There are no other land routes to carry the commerce between the State of Florida and its markets in the East and North. A narrow passage at the point where the States of Georgia and North Caro-

lina are contiguous is free from artificial barrier at the hands of men, but is blocked by the hand of nature. There is only one road through this gap, "a narrow road, full of short curves and mountain climbs which make it a very hazardous highway for trucks of any size to travel (R. 216)."

Some conception of the importance to the State of Florida of the motor transportation along the Atlantic Seaboard can be obtained from statistics of past years, although these do not reflect the advances in this commerce of recent years, especially that developed since the regulation and promotion of the motor carrier industry under the Motor Carrier Act. Thus it is disclosed by a census of motor trucking for hire, conducted by the Bureau of the Census for the year 1935,[1] that the 277 Florida concerns subjected to the census had a revenue for the year of $3,455,000. While only 23, or 8 per cent, of these concerns were primarily engaged in interstate commerce, their share of the annual revenue was $1,032,000, or 30 per cent of the total. However, it was recognized by this very study that private trucking constitutes the major part of all trucking operations in the United States (page 1), and it must be further observed that a great majority of the trucks operating into and out of the State of Florida are licensed in other States. Thus the Report of a Survey of Traffic in the State of Florida (for the year 1933-34) published by the United States Bureau of Public Roads and the State Road Department of Florida revealed (page 59) that Florida citrus fruit is carried principally by out-of-state registered vehicles. We quote from that report (p. 59):

[1] Motor Trucking For Hire, Census of Business, 1935, Bureau of the Census, p. 40.

"More than 80 per cent of all trucks crossing the border and transporting citrus fruits are licensed in States other than Florida. This indicates the centers of ownership of the trucks are probably near the ultimate destination of the shipments, the trucks often being sent to Florida empty to obtain their loads and return. Likewise, garden produce is transported predominantly by out-of-State vehicles, to the extent of 71 per cent of all such trucks. Miscellaneous and empty outgoing trucks have nearly equal distribution of registrations between Florida and out-of-State licenses, while 41 per cent of all outgoing trucks are registered in Florida and 59 per cent are of foreign registry."

It was further found (Report, *supra,* pages 55-57) that:

"During the year survey, 215,599 trucks crossed the State line, outbound from Florida to adjoining or distant States. Of this volume 31,590 trucks, or 14.7 per cent of the total, were carriers of citrus fruit; 17,245 trucks, or 8 per cent, were carriers of truck garden produce; 86,039 miscellaneous trucks, representing 39.9 per cent; and 80,725 empty trucks, or 37.4 per cent of the total. . . . Other than to Atlanta, Georgia, shipments of truck garden produce were principally consigned to northern cities, with Washington, D. C., Baltimore, Maryland, and cities through Virginia, North Carolina, and Tennessee the principal destinations.

"On U. S. 41, there was recorded the greatest number of outgoing trucks, not only in carriers of citrus fruit but also of garden produce. This route joins the Florida producing areas with Atlanta, Georgia, Chattanooga, Tennessee, and the northern States west of the Appalachian Mountains and carries 32 per cent of the total 31,590 interstate citrus fruit trucks. Of nearly equal importance is U. S. 17, north from Jacksonville, over which there

Figure 22.—Distribution of Florida citrus fruits by States; annual truck and rail and boat shipments

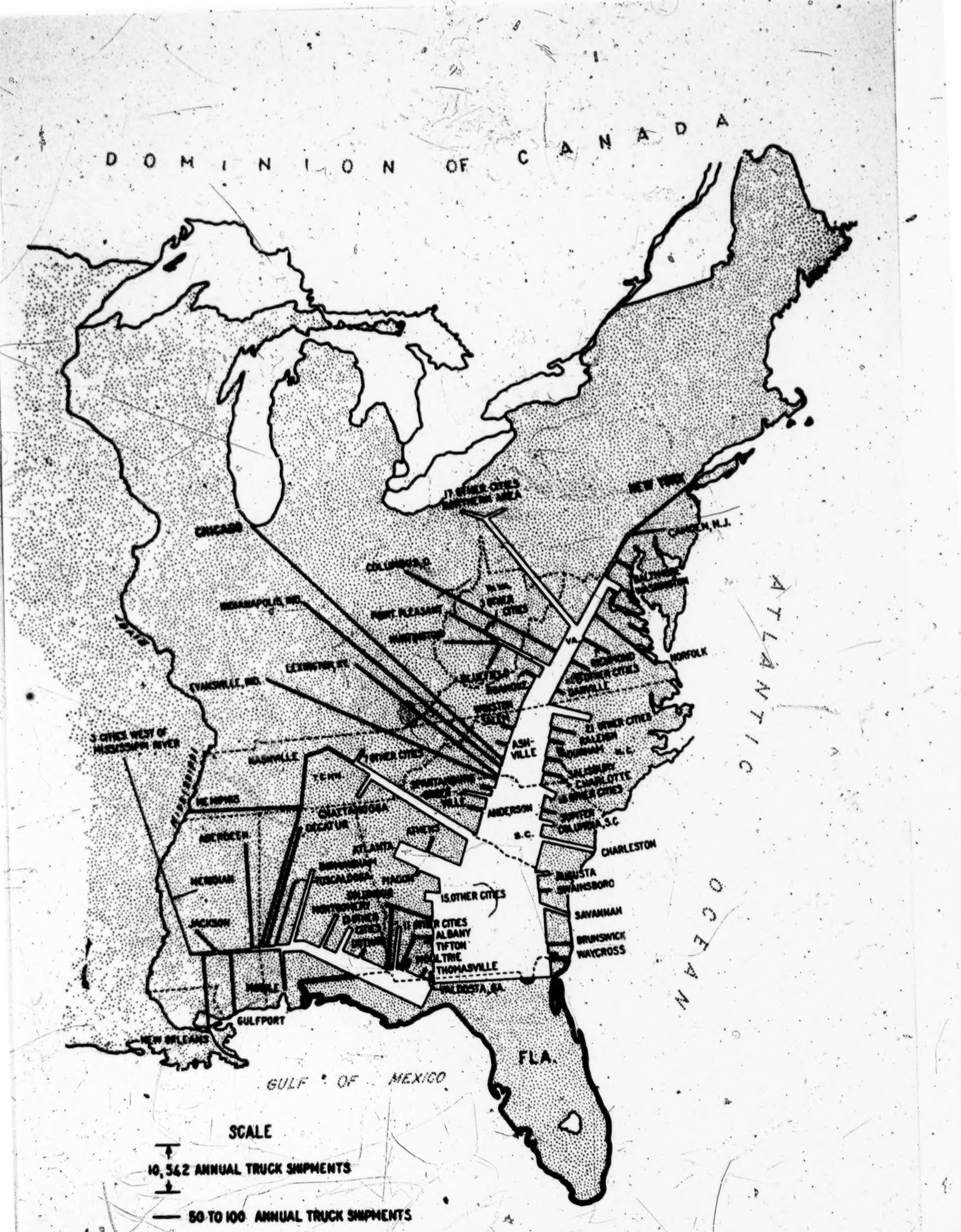

Figure 23.—Distribution of Florida citrus fruit by principal cities and areas.

moved 29 per cent of all interstate citrus fruit trucks. This road, and U. S. 1, also north from Jacksonville, are the channels for Florida's produce to reach the large northeastern markets and supply the communities along the Atlantic seaboard. U. S. 1 carried 20 per cent of the outgoing citrus fruit trucks.

"Of the 17,245 annual outgoing garden produce trucks, 37 per cent moved over U. S. 41; 32 per cent over U. S. 17; and 13 per cent over U. S. 1. The miscellaneous truck movement on these 3 routes in percentages of total outgoing miscellaneous trucks is: U. S. 41, 13 per cent; U. S. 17, 10 per cent; and U. S. 1, 20 per cent, respectively.

"In combination, the above 3 routes are Florida's commercial gateways of truck commerce, accounting for 81.8 per cent of all citrus fruit exports, by truck, and 82 per cent of the total garden produce. On these 3 routes, miscellaneous trucks amounted to 43.2 per cent and empty trucks, 38.8 per cent of the total of each carried on the 12 principal State roads crossing the Georgia and Alabama borders."

Figures 22 and 23 reproduced from this Report, illustrate the protection afforded but one important Florida industry by the decree of the District Court.

On page 59 of the Report it is found that much of the truck garden produce "is transported in modern refrigerator trucks carrying perishables with as high a degree of safety as that offered by railways." But the evidence below reveals, and the District Court found (Finding of Fact No. 10, R. 79), that if the South Carolina regulations be enforced, these refrigerated vehicles (tractor semi-trailers (R. 110)) will be driven from the highways. These refrigerated vehicles, moving along the Atlantic seaboard today, weigh empty 13,600 pounds and carry a pay load of 20,000 pounds, a gross weight of 33,600 pounds (R. 157). The enforcement of the

South Carolina regulations will reduce their pay loads 68 per cent, to 6,400 pounds, a pay load which could not be carried more than a few miles save at a loss.

The Interest of the State of Florida in the National System of Interstate Highways.

A comprehensive survey of the growth and purpose of the Federal Aid System of Highways is to be found on pages 19-40 of appellees' brief, and we deem it unnecessary to review that history here.

Suffice it to say that by the cooperative efforts of National and State governments this Nation is now possessed of "an adequate and connected system of highways interstate in character," in accordance with the mandate of Section 6 of the Federal Highway Act of 1921 (42 Stat. L. 212).

This system of highways has been constructed and maintained according to standards established by the United States Bureau of Public Roads, in the exercise of the power conferred upon the Secretary of Agriculture by Section 8 of the Federal Highway Act of 1921 "to approve the types and width of construction and reconstruction and the character of improvement, repairs, and maintenance" of these highways. It was early recognized that highways could not be "interstate in character" if the standards by which such highways were built in one State varied in large degree from those by which they were built in other States.

While complete uniformity was and always will be impossible, substantial uniformity in design and capacity has been achieved so that this Nation now possesses a national system of improved and interconnected interstate highways, which, from the standpoint of physical

characteristics, now permits the relatively unimpeded movement of interstate transportation.[2]

The general standard of weight capacity adopted by the Bureau was 16,000 pounds per axle for high-pressure, and 18,000 pounds per axle for low-pressure, pneumatic tires and it has been for these capacities that the Bureau has designed the main highways in the interconnected system.[3] Informed by its own knowledge of the designs and capacities of these interstate highways over the Nation, the Bureau of Public Roads, in 1934, under authority contained in the Federal Highway Act of 1921, published a "Uniform Act Regulating Traffic on Highways," as revised and approved by the Fourth National Conference on Street and Highway Safety, May 23, 25, 1934, which was recommended for adoption by all the States (R. 275). By Section 145 thereof (R. 277) wheel loads not in excess of 8,000 pounds and 9,000 pounds, and axle loads not in excess of 16,000 and 18,000 pounds are recommended, depending upon whether high-pressure or low-pressure pneumatic tires are used. All the States of the Union, save about five, now have tire, wheel, or axle limitations in substantial conformity with these recommendations.

Substantial uniformity in width has likewise been achieved in conformity with Section 9 of the Federal Highway Act of 1921, which provided:

> "That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds.

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[2] "Government Activities in the Field of Transportation", Report No. 12 of Select Committee to Investigate Executive Agencies of the Government pursuant to Senate Resolution No. 217 (74th Congress) 1937, p. 12.

[3] Testimony of Thomas H. McDonald, Chief, U. S. Bureau of Public Roads, before the Interstate Commerce Commission, Docket No. 23,400.

> "That all highways in the primary or interstate system constructed after the passage of this Act shall have a right of way of ample width and a wearing surface of an adequate width which shall not be less than eighteen feet, unless, in the opinion of the Secretary of Agriculture, it is rendered impracticable by physical conditions, excessive costs, probable traffic requirements, or legal obstacles."

As a result, a standard 96 inch width limitation for motor vehicles has long been recommended by the Bureau of Public Roads to all the States (R. 280) and has the support and recommendation of the American Association of State Highway Officials (R. 280). Forty-seven of the 48 States have given recognition to this uniformity of design in the interstate system and have prescribed the 96 inch limitation. The present inventory of interstate motor equipment has been designed to this capacity (Finding of Fact No. 24, R. 83).

In order to protect the national investment, assure the permanence of the Federal Aid system, and guard against its disruption by State abandonment or refusal to maintain the Federal Aid highways, it is provided by Section 14 of the Federal Highway Act of 1921:

> "That should any State fail to maintain any highway within its boundaries after construction or reconstruction under the provisions of this Act, the Secretary of Agriculture shall then serve notice upon the State highway department of that fact, and if within ninety days after receipt of such notice said highway has not been placed in proper condition of maintenance, the Secretary of Agriculture shall proceed immediately to have such highway placed in a proper condition of maintenance and charge the cost thereof against the Federal funds allotted to such State, and shall refuse to approve any other project in such State, except as hereinafter provided.

> "Upon the reimbursement by the State of the amount expended by the Federal Government for such maintenance, said amount shall be paid into the Federal highway fund for reapportionment among all the States for the construction of roads under this Act, and the Secretary of Agriculture shall then approve further projects submitted by the State as in this Act provided. . . ."

Between 1916 and October 31, 1936 the Federal Government had paid to the various States the sum of $2,197,634,970.13, and about $500,000,000 had been apportioned but not paid out (R. 137, 252) for the development of the designated Federal aid system. This expenditure has been the investment of all the people of the United States, the people of Florida as well as the people of South Carolina. The purpose and design has been national, not local. This Court in *Nashville, etc. R. Co.* v. *Walters,* 294 U. S. 405, 417, recognized the functional difference between these highways and the local highways of the States:

> "The state highways of Tennessee (as distinguished from county and city roads and turnpikes) have their origin in the Federal aid highway legislation. The aim of that legislation is 'a connected system of roads for the whole Nation'; 'to provide complete and economical highway transport throughout the Nation', to furnish 'a new means of transportation no less important to the country as a whole than that offered by the railroads'; to establish 'lines of motor traffic in interstate commerce.'"

While accurate statistics are unavailable, it cannot be doubted but that 90 per cent of interstate motor carrier traffic is carried over highways in the Federal aid system.[4]

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[4] Michigan Law Review, Vol. 33, No. 2, December 1934, p. 251-252.

All the States and their peoples rightly feel a deep concern in the proper functioning of the Federal aid system of highways. State legislation which needlessly disrupts that system affects the interests not of that State alone but the interests of all the States. While by the Federal aid undertaking the cost of maintenance and the responsibility of regulation is left with the States, certainly the Commerce Clause of the Constitution of the United States is guarantee against regulations which, exceeding their reasonable necessity, erect a barricade around the borders of a State and deny to interstate commerce a reasonable use of the Federal aid system within its borders. Thus this Court said in *Morris* v. *Duby*, 274 U. S. 135, 145:

> "Regulation as to the method of use . . . remains with the States . . . unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contributions to bettering the highway systems of the Union . . ."

The Interest of the State of Florida and Its People in the Successful Administration of the Purposes and Policies of the Congress of the United States as Expressed and Embodied in Part II of the Inter-State Commerce Act (Motor Carrier Act, 1935).

The State of Florida, in common with all the States, is vitally concerned that the purposes and policies of Congress, as expressed and embodied in Part II of the Interstate Commerce Act (Motor Carrier Act, 1935), be effectively realized.

The 74th Congress of the United States in August, 1935, enacted Part II of the Interstate Commerce Act, otherwise designated as the "Motor Carrier Act, 1935." It was declared by Section 202(a) thereof to be the policy of Congress:

"to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest;

"to promote adequate, economic and efficient service by motor carriers, and reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices;

"improve the relations between, and co-ordinate transportation by and regulation of motor carriers and other carriers;

"develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense;

"co-operate with the several states and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part."

This broad and comprehensive statute regulating and promoting the transportation of persons and commodities in interstate commerce over land highways was "not a wayward spark of the legislative fury, fanned by the resentment of motor competitors."[5] Within the ten year period prior to its passage at least thirty-five bills had been introduced relating to the subject. Hearings were held on some; reports made in others; and one[6] was even debated in and passed by the House. The first Act to be enacted, the one now in effect, came only after long and serious study.

Throughout this formative period the States were pressing strongly for comprehensive federal regulation.[7]

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[5] Georgetown Law Journal, Vol. 24, No. 2, p. 424, January, 1936.

[6] H. R. 10288, 71st Cong. 1st Sess. (1930).

[7] Report of the Federal Coordinator of Transportation, 1934, p. 123, 74th Cong. 1st Sess., House Document No. 89.

State efforts to regulate and promote commercial motor transport in the public interest had become increasingly ineffective due to the national nature of the problem and constitutional inhibitions inherent in the problem of interstate regulation. The situation was similar to that existing prior to the enactment in 1887 of the first Act to Regulate Commerce.

The first step taken by the States to meet the situation was the appointment in 1925 by the National Association of Railroad and Utilities Commissioners of a Special Committee to draft a bill proposing federal regulation of interstate common carriers of freight and passengers by motor vehicle. This bill (S. 1734) was introduced in the Senate in the First Session of the Sixty-first Congress. At the same session a bill (H. R. 8266) practically identical in substance was introduced in the House. Neither of these bills got beyond the committee stage, but since that time the States, through their State commissioners, consistently advocated federal regulation. The Rayburn Bill (H. R. 6836, 73rd Cong. 2nd Sess.) supported by the Federal Coordinator of Railroads, Hon. Joseph B. Eastman, was drawn by the Committee on Legislation of the National Association of State Railroad and Utilities Commissioners.[8] Reintroduced in the 74th Congress, it was enacted into law without substantial modification.

It was fitting and proper that all the States in the Union should have thus cooperated to the salutary end that the interstate transportation by motor carriers over their several highway systems should be so regulated by the national government as "to recognize and preserve the inherent advantages of" and to "foster sound economic conditions in, such transportation and

[8] Regulation of Transportation Agencies, p. 25, 73d Cong. 2d. Sess., Senate Document No. 152.

among such carriers in the public interest," to "promote adequate, economic and efficient service by motor carriers," to "improve the relations between, and coordinate transportation by and regulation of motor carriers and other carriers," to "develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States."

If these purposes can be achieved and these policies administered, then the use of the States' highways by interstate traffic will be a use consistent with their proper purpose and function, and will in itself be an end justifying the great cooperative expenditures and effort of the States and National Government under the Federal Highway Acts, in the completion of a national system of highways interstate in character.

Any State law which tends to subvert and defeat these purposes and policies, not only impairs the investment which that State and all the States have made toward the creation of the national interstate highway system, but denies to its own highways that protection which can flow only from a system of interstate motor transportation regulated and promoted in the public interest.

The interest of all the States in the effective realization of the purposes and policies of the Motor Carrier Act is accentuated by the fact that this Act, like the Federal Highway Acts, contemplates and requires for its successful administration, the cooperation of the National and State governments.

Thus, it is expressly declared to be the policy of Congress "to cooperate with the several States and the duly authorized officials thereof . . . in the administration and enforcement" of the Act.[9]

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[9] Motor Carrier Act, Sec. 202(a).

The Act goes beyond mere declaration. Embodied in the Act as a fundamental feature is the plan for the utilization of State administrative machinery in effectuating federal regulatory power. This striking technique for effective Federal and State cooperative regulation was molded into the Motor Carrier Act at the instance of all the States, motivated by a desire to preserve the powers and capitalize upon the experience of the State commissions, to coordinate interstate and intrastate motor carrier policies, and to commit the solution of local interstate problems to State officials intimate with local conditions.

Section 205(b) of the Act requires that all controversies in which the interstate operations involve no more than three States shall be referred by the Commission to joint boards for hearing and recommendations of appropriate orders if any of the following matters are involved: applications for the issuance of certificates, permits, or licenses; the suspension, change, or revocation of such certificates, permits, or licenses; applications for the approval and authorization of consolidations, mergers, and acquisitions of control or operating contracts; complaints as to violations by carriers of the requirements established by the Commission with respect to continuous and adequate service, etc.; complaints as to the violations of the Commission's rules by brokers; and complaints as to rates, fares, and charges of motor carriers. The Commission in its discretion may also refer to joint boards any of the foregoing matters when more than three States are involved, and it may refer to said boards any investigation or other matter not specifically mentioned above.

These joint boards provided for by the Act are boards composed of one member from each State in which the

particular interstate carrier operation in controversy at the time is to be performed, nominated by the regulatory commission of the State from its own membership or otherwise, or by the Governor. Their duties, powers, and jurisdiction are the same as those of members and examiners of the Commission, and any order recommended by a joint board is subject to the same rules as an order recommended by a member or an examiner of the Commission. Thus Section 205(a) provides that if no exceptions are filed within the specified time, the recommended order shall become the order of the Commission unless stayed or postponed by the Commission within the specified period. If, however, exceptions are filed with the Commission, it is bound to consider the same and a review or further proceedings are authorized if sufficient reason appears therefor from the record. The Commission may also review decisions of joint boards on its own motion.

As of this writing, 257 Joint Boards have been created under the Act. The Interstate Commerce Commission properly accords great weight to the recommendations of these Boards, following them in approximately 85 per cent of the instances where their reports have been reviewed. This is almost the same percentage that obtains in the case of recommendations by the Bureau's own examiner.[10]

Thus it is that the State of Florida, in common with all the States of the Union, must observe with grave concern the enforcement of State regulation which will defeat and subvert the policies and purposes of Part II of the Interstate Commerce Act.

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[10] Report of Special Committee, American Bar Association, to Appraise Regulation of Motor Vehicles, August, 1937, page 13.

Undisputed and Unchallenged Findings of Fact by the District Court Make it Inevitable that the Enforcement of the South Carolina Regulations Will Defeat the Purposes and Subvert the Policies of the Motor Carrier Act as Administered in the Southeastern Section of the United States.

The drastic effect of the enforcement of the South Carolina regulations upon interstate commerce in the Southeastern section of the United States is concisely expressed in the District Court's Findings of Fact, Nos. 7 to 16, inclusive (R. 78-81), which were unexcepted to by appellants. These Findings are based upon extensive and detailed testimony of carriers, shippers and traffic experts, private and governmental, testimony unchallenged at the trial below and, indeed, confirmed by judicial knowledge.

These findings make it plain that the enforcement of the South Carolina regulations will defeat the purposes and subvert the policies of the Motor Carrier Act.

From 85 per cent to 90 per cent of the equipment used in interstate commerce is 96 inches wide and will be automatically barred at the borders of South Carolina by the 90 inch width limitation (Finding of Fact No. 24, R. 83). The motor equipment in 47 States must needs be junked and hereafter limited to the proposed South Carolina standard, or special equipment must be purchased in each State for use into, across or from South Carolina. The gross weight limitation will reduce the ordinary pay loads of interstate vehicles over 150 per cent (See Table II, Appellees' Brief, p. 72). From whatever State of origin, the interstate vehicle must either carry a pay load so small that it is unprofitable to operate, or must stop at the borders of South Carolina and reload into two smaller trucks, with all the

attendant cost, delay and impairment of service. (Finding of Fact No. 7, R. 78.)

How then may the common carrier comply with its statutory duty (Section 216(b)) "to provide safe and adequate service, equipment and facilities for the transportation of property in interstate commerce," or how may the Commission itself exercise its power (Section 204(a)) "to establish reasonable requirements with respect to continuous and adequate service"?

By Section 216(c) of the Act common carriers of property by motor vehicle "may establish reasonable through routes and joint rates . . . with other such carriers, or with common carriers by railroad, express, or water," but the District Court expressly found (Finding of Fact No. 8, R. 78) that "enforcement of the South Carolina law . . . would prevent the interchange of motor truck equipment and the establishment of through routes and joint rates on shipments moving into, out of and across South Carolina."

By Section 216(b) of the Act it is made the duty of common carriers by motor vehicles "to establish, observe, and enforce just and reasonable rates . . ." and by Section 216(d) it is declared unlawful for any common carrier by motor vehicle "to make, give or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, or description of traffic . . . or to subject any particular person, port, gateway, locality, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The disastrous effect of the enforcement of the South Carolina regulations upon the rates and rate returns of motor carriers is described in the testimony of Emory A. Boudreau, Assistant Chief of the Section of

Traffic, Bureau of Motor Carriers, Interstate Commerce Commission (R. 138-142).

Two vivid illustrations from his testimony are quoted in appellees' brief at page 61, and we respectfully refer the Court to that reference. But with especial regard to the rate situation for traffic originating in or destined to the States of Georgia and Florida and crossing the State of South Carolina, we quote further from his testimony (R. 141-142):

> "The increased rate would be the same on traffic passing through South Carolina, although the rate might be lowered by the carrier if he established transfer arrangements at state line points, say, like Rockingham, North Carolina, or Augusta, Georgia. Now the distance from Raleigh, North Carolina, and Macon, Georgia, is approximately 418 miles and if a carrier was restricted in his operation to 20,000 pounds gross weight, and he operated such equipment from terminal to terminal, he would require a rate of 99½ cents per one hundred pounds, whereas if he can operate 40,000 pounds from terminal to terminal the rate would be 50½ cents per one hundred pounds, or a difference of forty-nine cents.
>
> "With reference to unloading at the border, if a carrier established transfer points at Rockingham, North Carolina and Augusta, Georgia, where he could transfer his loads from a 40,000 pounds gross weight vehicle to a 20,000 pound gross weight vehicle, in order to cross the state of South Carolina, he would still require an increase of 20.9 cents, or 21 cents per one hundred pounds over the rate required if he is permitted to operate the larger vehicle from terminal to terminal. In other words, he would require 72 cents for such transfer arrangement, as against 50½ cents if permitted to operate his 40,000 pound vehicle through.
>
> "Of course in these transfer examples I have cited I have not taken into consideration the cost of

transfer, the possible cost of equipment or terminals that might have to be purchased at the transfer points."

In making these rate comparisons the witness was considering only the effect of the enforcement of the weight restrictions, *and not the 90-inch width restriction which will bar from 85 to 90 per cent of all interstate vehicles from crossing the borders of South Carolina.* If this element be considered, of course these rate contrasts will be aggravated enormously.

The witness' rate comparisons, it is true, were based upon cost of operation and not competition, and if these regulations be enforced practical rates will vary downward from the witness' estimated rates, but how under these conditions will be promoted the policy of Congress to "foster sound economic conditions in such transportation and among such carriers in the public interest (Sec. 202(a))?"

It is provided by Section 216(i) of the Act:

> "In the exercise of its power to prescribe just and reasonable rates for the transportation of passengers or property by common carriers by motor vehicle the Commission shall give due consideration, among other factors, to the inherent advantages of transportation by such carriers; to the effect of rates upon the movement of traffic by such carriers; to the need, in the public interest, of adequate and efficient transportation service by such carriers at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable such carriers, under honest, economical, and efficient management, to provide such service."

It will be impossible for the Commission to reconcile the needs of the carriers and the needs of the public, as

here required, under the burden which will be inflicted by enforcement of the regulations and in face of the competition that will exist from other systems of transportation.

The District Court specifically found (Finding of Fact No. 15, R. 80-81) that "the enforcement of the South Carolina law would result in the diversion of large cargoes normally consigned to the port of Charleston, to other competing ports in other States along the Atlantic seaboard." Yet such a result is but illustrative of the many undue and unreasonable preferences which will be created, and discriminations and prejudices to which ports and localities, and the State of Florida itself, will be subjected, if these regulations be enforced.

How, under the embarrassment of these burdens will fare the policy of Congress to "recognize and preserve the inherent advantages of" transportation by motor vehicle (Sec. 202(a))? Speed, one of the principal "inherent advantages" will be done to nought, although:

> "The Commission has held in a number of decisions that speed of delivery is an inherent advantage of transportation by motor carriers over transportation by competing rail carriers which it is required by Section 202(a) of the Act to recognize as in conformity with the public interest, *even though rail carriers are rendering sufficient but slower service.*" *Hahn Truck Line, Contract Carrier Application,* 1 M. C. C. 479, decided February 15, 1937.

One of the "inherent advantages" of motor transportation which is of especial concern to the Southeastern section of the United States and to the State of Florida is the facilitated movement of fresh vegetables and fruits and other agricultural products from production

fields to the metropolitan areas of the North and East. This advantage will also be done to nought by the enforcement of the regulations (Finding of Fact No. 10, R. 79), not only because the time of delivery will be doubled by border interchange and increased handling —or as an alternative, the payload maintained below profit—but because the refrigerated vehicle vital to the industry, will be driven from interstate commerce along the Atlantic seaboard (Finding of Fact No. 10, R. 79). This follows from the fact that the modern refrigerated tractor semi-trailer in use today along the Atlantic seaboard weighs 13,600 pounds, empty. Loaded, it weighs 33,600 pounds with a ten ton pay load (R. 157). Thus loaded, it is moving the traffic today, and is threatened only by the South Carolina regulations which will reduce its pay load of 10 tons to only 3.2 tons, or 6400 pounds, *a reduction of 68 per cent.*

The State of Florida Foresees, in the Enforcement of the South Carolina Regulations, the Perpetuation of the Interterritorial Freight Rate Boundary Which Has for Many Years Constituted a Barrier Against the Free Flow of Commerce From the South.[11]

The burden upon the South inflicted by the interritorial freight rate barrier flung across its arteries of interstate commerce leading to the Nation's markets, has been increasingly recognized in recent years. That burden was well described by David E. Lilienthal, Direc-

[11] " . . . An objectionable phase of the railroad situation for many years has been the maintenance of regional differences and distinctions, which are very imperfectly related to differences in costs and of territorial boundary lines ('Chinese walls') where rate systems and practices change. It has tended to provincialize the railroads and discourage national unity of action. It has

tor, Tennessee Valley Authority, before the Institute of Public Affairs of the University of Georgia, at Athens, Ga., October 29, 1936, when he said:

> "There are barriers to a sound industrial development in the South. Some of them are artificial—made by man and removable by man. For example, the South is surrounded by a Chinese wall of freight rates that place it at a disadvantage in the marketing of its industrial products. There is not time tonight to do more than mention this burden on Southern industry, but it furnishes one reason (some would even go so far as to say a justification) for the pressure on wage rates in Southern industry. And it has come to be recognized that low wages, which means low purchasing power, is one of the most serious forms of the draining of wealth and income."

The Southern States are now engaged in an effort to remove the artificial rate barriers against industrial progress in the South. On May 26, 1937, the Governors of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee filed an application with the Interstate Commerce Commission (I. C. C. Docket No. 27746) charging that "the acts, practices, rates, charges, rules and

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been a prolific source of complaints to the Commission. Regional competition in rates and services has been as keen as the direct competition of parallel lines, and has had equally undesirable and uneven results." First Report of Coordinator of Transportation, Senate Document No. 119, 73d Cong., 2d. Sess., 1934, p. 29.

For a fuller outline of the nature, extent, and seriousness of this problem reference may be made to a Survey entitled "The Interterritorial Freight Rate Problem of the United States", conducted by the Board of Directors of the Tennessee Valley Authority, transmitted by the President of the United States to the 75th Congress, 1st Session, and printed as House Document No. 264.

regulations of defendants (rail-carriers) is a denial of the national purpose of the Interstate Commerce Act and constitutes an arbitrary barrier against shippers shipping commodities from Southern territory." But the enforcement of the South Carolina regulations will perpetuate these barriers and render futile present efforts to find a permanent solution to the interterritorial freight rate problem. This result is reflected in the testimony of Thomas J. Burke, Commissioner of the Charleston County Traffic Bureau (R. 105):

> "The freight rates in the Southeastern part of the country are somewhat higher than those in the Middle West. If the truck competition with railroads was eliminated [illegible] truck competitive rates now in effect would go out and you would go back to the normal level of rates, which is higher than these competitive rates. This would mean that commerce flowing into, out of and across South Carolina would be carried at higher rates to the public . . .
>
> "The situation as to the higher rates in the Southeastern part of the country has been a gradual process. In 1928 the rates were all revised in the southern part of the United States under what is known as the Southern Class Rate Investigation—that was class rates—but since that time we have revised the commodity rates. At the time the class rates were revised the level in the South was 25 per cent higher than the midwest section of the country. That level today has risen to about 40 per cent higher.
>
> "The truck competition with the railroads has tended to keep the levels of the rates down. If it were removed, this would be a detriment to the shippers and to the citizens of this State and section."

The District Court has Found Upon Adequate Evidence that the Burden Upon Interstate Commerce Resulting From the Enforcement of the South Carolina Regulation will be Arbitrarily and Needlessly Imposed.

That the District Court was justified in finding that the disastrous burden upon interstate commerce in the Southeastern section of the United States which will result from the enforcement of the South Carolina regulations will be needlessly and arbitrarily imposed, because these regulations exceed the reasonable necessity for their exercise, adequately appears from the lower Court's opinion and from the supporting discussion in appellees' brief, pages 63-100.

That the regulations exceed their reasonable necessities not only from the standpoint of the conservation of the highways but also from the standpoint of the safety of the highways is apparent from the findings of the lower Court (Finding of Fact No. 23 and 24) and its Opinion (R. 67, 73). The evidence disclosed that contrary to the supposed purposes of the Act, its enforcement will increase the hazard of the highways by increasing the number of vehicles on the highways, encouraging the use of light, over-loaded vehicles of flimsy construction, small tire surface and braking surface, discouraging the use of power brakes, proper tires and substantially built vehicles properly adapted to safe driving, and by encouraging poor distribution of loads over the axles.

The reasonable necessities of the states in limiting the size and weight of motor vehicles operating in interstate commerce for the purpose of safety should be con-

sidered in the light of the provisions of the Motor Carrier Act, 1935, which empowers the Interstate Commerce Commission (Sec. 204 (a) (1) (2)) to establish reasonable requirements for common and contract carriers with respect to qualifications and maximum hours of service of employees, and safety of operation and equipment; and (Sec. 204 (a) (3)) to establish for private carriers of property, if need therefor is found, reasonable requirements to promote safety of operation, and to that end to prescribe qualifications and maximum hours of service of employees and standards of equipment.

Pursuant to such power the Interstate Commerce Commission, on December 23, 1936, approved, adopted and prescribed comprehensive rules and regulations, to become effective July 1, 1937, concerning the matter of qualifications of employees and safety of operation and equipment of such common and contract carriers, designed to bring about greater safety on interstate highways in accordance with the declared policy of the Act. These prescribed regulations covered such matters as qualifications of drivers, reckless driving, speed, driving, stopping, lights, brakes, parts and accessories, loading and reporting of accidents.

These initial regulations did not include sizes and weights of motor vehicles in interstate commerce. Nevertheless, the Commission by its Report issued on July 1, 1936, included sizes and weights of motor vehicles as a part of its proposed long-term program for highway safety, and in its Report of December 23, 1936 (Ex Parte No. MC-4, 1 M. C. C. 1-36), accompanying its order of that date above referred to, expressly recognized a jurisdiction over sizes and weights for the pur-

pose of safety and deferred action thereon for the reason, among others, that "the art of motor vehicle construction and operation is one of constant change and improvement" and in order "to leave the way open for further technical advance," and to study and outline the elements of the problem.

IN THE

Supreme Court of the United States

OCTOBER TERM 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL.,
Appellants,

v.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.,
Appellees.

BRIEF FOR STATE OF FLORIDA AS AMICUS CURIAE.

ARGUMENT.

The District Court, Having Found That the South Carolina Regulations Will Impose a Drastic Burden on Interstate Commerce and That They Exceed the Reasonable Necessity for Their Exercise, Correctly Held That Their Enforcement Will Constitute a Regulation of Interstate Commerce in the Constitutional Sense and Thus Will Contravene Article I, Section 8, Clause 3 of the Constitution of the United States.

Appellants' briefs and supporting briefs contend that even though the District Court's findings of fact be admitted, there is escape from the District Court's con-

clusion of law that the regulations inflict an unconstitutional burden on interstate commerce; that even though these regulations exceed the reasonable necessity for their exercise and will inflict upon interstate commerce a disastrous burden, they are yet within the power of the State.

The argument of these briefs may be analyzed as follows:

(1) Since the District Court found that the regulations were consistent with the Due Process Clause of the Fourteenth Amendment, the Commerce Clause subjects them to no further test other than that they shall not discriminate against interstate commerce, which by their terms they do not do;

(2) The effect of the enforcement of the regulations upon the purposes and policies of Congress as expressed in the Federal Highway Acts and Part II of the Interstate Commerce Act (Motor Carrier Act, 1935) is of no significance in determining their validity under the Commerce Clause;

(3) That if it be conceded that State police power generally may not exceed its reasonable necessity as it affects interstate commerce, the Commerce Clause imposes no such restraint upon the regulation by the State of its own property; that in the regulation of its own highways State power is absolute, save only that it shall not discriminate against interstate commerce; and

(4) That by its decisions in *Morris* v. *Duby,* 274 U. S. 135, and *Sproles* v. *Binford,* 286 U. S. 374 this Court established these arguments as the law of the land.

We earnestly submit that these arguments, separately or collectively, find no support in the past decisions of

this Court, and are subversive of fundamental guarantees under the Commerce Clause of the Constitution of the United States.

The error inherent in all four of the arguments advanced by appellants springs from their failure to recognize that the test of the validity of State police regulation under the Commerce Clause is separate and distinct from the test under the Fourteenth Amendment.

Appellants assert that since the lower court found that the regulations (1) have not been superseded by Federal legislation, (2) deal with a subject which admits of diversity of treatment according to the special requirements of local conditions, (3) apply indiscriminately to intrastate and interstate commerce, and (4) are consistent with the Fourteenth Amendment, there is no other test to apply and the regulations are valid *regardless of the effect of their enforcement upon interstate commerce.*

This argument, however, ignores the fundamental principle that State police regulation substantially affecting (although not discriminating against) interstate commerce must not only be consistent with due process (that is, "shall not be unreasonable, arbitrary or capricious" and "the means selected shall have a real and substantial relation to the objects sought to be attained," *Nebbia* v. *New York,* 291 U. S. 502, 525), but must also *not exceed the reasonable necessity* for the exercise of the police power. There is a wide range of discretion for State police power under the Fourteenth Amendment; the State is not confined by the Due Process Clause to its reasonable necessities. As thus tested, even as appellants contend, the wisdom and the justice of the law is for the State legislature to determine. But no such range of discretion, no such ultimate power to judge the wisdom and justice of their police laws,

remains to the States when the effect of the enforcement of a law is to burden interstate commerce.

The Due Process Clause involves adjustments between the public, viewed as a State or a subdivision thereof, and an individual or individuals; the Commerce Clause involves adjustments between State and Federal power. Though every taking without due process of law is a burden on interstate commerce, if the subject dealt with is such commerce, it does not follow that the reverse is true.

The constitutional basis for the distinction is clear. The paramount authority of Congress over the regulation of interstate commerce has often been asserted by this Court and can no longer be doubted. *Minnesota Rate Cases,* 230 U. S. 352. Nevertheless, it has been recognized that there exists in the States a permissible exercise of authority which they may use until Congress has taken possession of the field of regulation. This Court has thus described this residual State power (*Minnesota Rate Cases,* 230 U. S. 352, 402):

> "Within these limitations there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the *necessity* that they should not remain unregulated and that their regulation should be adapted to varying local *exigencies;* . . . " (Emphasis added)

"By the Constitution, Art. I, Section 8, Cl. 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the States." *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 596.

The exertion of this residual State power does not impose *regulation* (in the constitutional sense) upon interstate commerce which might be affected—it merely imposes a *necessary condition,* no less necessary and no more a regulation than that imposed by mountain ranges or broad rivers flung by the hand of God across the paths of commerce. Alike they are *necessary conditions,* not regulations of interstate commerce.

But the converse of this principle is that State legislation which exceeds the reasonable necessity for its exercise is no longer a *condition* of interstate commerce; it is *regulation* and forbidden by the Commerce Clause.

This principle, dear to the States and Nation alike, is firmly rooted in the dicta and decisions of this Court, as demonstrated in appellees' brief at pages 104-115. We need not repeat the quotations here. This Court has said that the police power of a State cannot "obstruct foreign commerce or interstate commerce *beyond the necessity for its exercise.*" *Railroad* v. *Husen,* 95 U. S. 465, 474; or "*unnecessarily* hamper commerce between the States" *Cleveland, etc. Ry. Co.* v. *Illinois,* 177 U. S. 514, 516; or subject interstate commerce "to unreasonable demands", *South Covington, etc. Ry. Co.* v. *Kentucky,* 252 U. S. 399, 404; or "to requirements that are *unreasonable* or pass beyond the bounds of suitable local protection," *Minnesota Rate Cases,* 230 U. S. 351, 401; or "go beyond the *necessities* of the case" *Lake Shore & Mich. So. Ry. Co.* v. *Ohio,* 173 U. S. 285, 300.

Perfect illustration of the application of the principle is found in *Seaboard Air Line Ry.* v. *Blackwell,* 244 U. S. 310, discussed at pages 104 to 108 of appellees' brief. Recognition of the principle is to be found in the recent opinion of this Court in *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 522, 525:

> "Nice distinctions have been made at times between direct and indirect burdens . . . the line of division between direct and indirect restraints of commerce involves in its marking a reference to *considerations of degree.*"

Failure to give recognition to the fundamental distinctions between the test under the Commerce Clause and the test under the Fourteenth Amendment leads appellants into further error in their discussions of the presumptions of validity underlying the South Carolina regulations and the power of the Courts to examine into their reasonableness. Thus appellants say (Ky. Br. 24):

> "The case, however, is fully covered by the well established principle that granted the *power* of the legislative body, the *wisdom* or *propriety* or even *justice* of its act is not open to the courts. And in the case of a state's exercise of its police power to protect its own property and citizens, the right of the courts to interfere is still further restricted, the rule being that in such a case, if there is any basis for a difference of opinion as to the propriety of the statute, it comes within the scope of legislative discretion, and the judgment of the Legislature and not of the Court prevails.
>
> "The Court, in considering this identical question in connection with the Texas statute limiting the weight and size of trucks, thus stated the principle in *Sproles* v. *Binford, supra* (388):
>
> "'When the subject lies within the police power of the State, *debatable questions as to*

> *reasonableness are not for the courts but for the legislature*, which is entitled to form its own judgment, and its action *within its range of discretion* cannot be set aside because compliance is *burdensome*.' (Citing authorities.)"

In the sentence of the Court's opinion immediately preceding the sentence quoted by appellants, it is expressly stated that the presumption under consideration was the presumption attaching to the validity of legislation under the Due Process Clause of the Fourteenth Amendment.

Where State laws are attacked under the Due Process Clause on the ground that they are arbitrary or oppressive, there is and should be a strong presumption in their favor. A State should be allowed a substantial opportunity to work out its own salvation so far as that State and its people are concerned. But the only presumption in favor of a State statute attacked under the Commerce Clause is the general presumption of constitutionality attaching to all legislation, federal, state, or municipal. The determination of the question of whether or not the practical effect of State regulations will burden interstate commerce, or whether or not these regulations exceed their reasonable necessities, are primary questions to be determined by the courts when such regulations are attacked under the Commerce Clause. These questions are not for the State legislature to judge, nor is the judgment of the State legislature binding merely because differences of opinion might exist. In such cases, it is a judicial determination not a legislative one.

> "One challenging the validity of a state enactment on the ground that it is repugnant to the commerce clause is not necessarily bound by the legislative declaration of purpose. It is open to

him to show that in their practical operation its provisions directly burden or destroy interstate commerce." *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, 10.

"The reasonableness of the state's action is always subject to inquiry insofar as it affects interstate commerce . . . " *Hendrick* v. *Maryland,* 235 U. S. 610, 622.

It is apparent that there are two conditions precedent to the application of the principle above discussed: *First,* that a substantial burden on interstate commerce will be caused by the enforcement of State legislation, and *second,* that such legislation exceed the reasonable necessity for its exercise. The District Court has found that both of these conditions exist under the evidence in this case. In reaching this conclusion the lower Court gave consideration to the effect of the enforcement of the South Carolina regulations upon the purposes and policies of the Congress of the United States as expressed in the Federal Highway Acts and in Part II of the Interstate Commerce Act (Motor Carrier Act, 1935). The District Court said (Opinion, R. 74):

"There is another angle from which the reasonableness of police regulations burdening interstate commerce in this way must be judged. Not only has Congress aided in the construction of the roads so that they may become highways of such commerce, but in the enactment of the motor carriers' act, it has recognized truck traffic as a legitimate part of that commerce essential to the welfare of the public and subject to regulation for that reason. As said of Federal aid legislation in *Bush Co.* v. *Maloy,* 267 U. S. 317, 324, this legislation regulating motor carriers is of significance because it makes clear the purpose of Congress that state highways shall be open to commerce of that character. Congress has not attempted to regulate size and weight

> and there are great practical difficulties in the way of such regulation by Congress. It is of great importance, therefore, that regulation of this matter by the states be held within reasonable bounds and that they be not permitted, under guise of exercising the police power, to exclude from their highways by unreasonable regulations the interstate commerce which Congress is regulating in the public interest and for the carrying of which it has aided in the construction of roads that form parts of a great national system of highways."

Appellants challenge the relevancy of these considerations on the theory (S. C. Br. 109-114) that since the lower Court found that neither of these Federal Acts superseded the power of the state to regulate the size and weight of motor vehicles using the highways, the enactment of this legislation had no effect whatsoever upon the State power. It is they say a case of "all the one thing or all the other." (S. C. Br. 110).

Appellants here betray a fundamental misconception of the rationale of the District Court's consideration of these Federal Acts. That the enactment of these Federal acts did not supersede or otherwise limit the power of the States is not to say that the effect of the enforcement of the State regulations upon the purposes and policies of these acts is not a relevant factor in determining, *first* whether or not such enforcement imposes a *substantial* burden on interstate commerce, and *second* whether or not, in view of the nature and functions of the highways constructed under the Federal Highway Acts, and the nature and functions of the commerce regulated and promoted under Part II of the Interstate Commerce Act, the regulations exceed the reasonable necessity for their exercise.

It is also in the light of the necessity for the concurrence of these two conditions, that is that a substantial

burden on interstate commerce exist and that the regulations exceed the reasonable necessity for their exercise, that we must examine the two prior decisions of this Court involving State restrictions of the size and weight of motor vehicles, *Morris* v. *Duby*, 274 U. S. 135 and *Sproles* v. *Binford*, 286 U. S. 374.

Even if it were possible to find in the language used by this Court in those cases support for appellants' contention that the State power in issue is limited only by the Due Process Clause of the Fourteenth Amendment, it would still be necessary to analyze the actual decisions in those two cases in accordance with the traditional policy of this Court as expressed in *Euclid* v. *Ambler*, 272 U. S. 365, 397:

> "This is in accordance with the traditional policy of this Court. In the realm of constitutional law, especially, this Court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out-of-hand attempts to establish general rules to which future cases must be fitted. This process applies with peculiar force to the solution of questions arising under the due process clause of the constitution as applied to the exercise of flexible powers of police, with which we are here concerned".

And it was early said by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheaton 264, 399:

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be

> respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

But there is in fact no support for appellants' theory either in the dicta or in the actual decisions of the Court in *Morris* v. *Duby* and *Sproles* v. *Binford*. In the former case it was said (at page 143) that regulations of the size and weight of motor vehicles must be "reasonable" and the same expression is found in *Sproles* v. *Binford* (at page 390), without further attempt to define the content of the word "reasonable". It is significant that this Court said in *Buck* v. *Kuykendall*, 267 U. S. 307, 315 that:

> "Appropriate state regulations, adopted primarily to promote safety upon the highways and conservation in their use, are not obnoxious to the commerce clause, *when the indirect burden imposed upon interstate commerce is not unreasonable.*"

But it is obvious that in neither of these two cases did the facts disclose the existence, either separately or concurrently, of the two conditions which are necessary to invoke the protection of the Commerce Clause, and which are present in the instant case. In neither *Morris* v. *Duby* nor *Sproles* v. *Binford* did the facts show a substantial burden on or interference with interstate commerce. Thus one indispensable condition was absent, and its absence rendered it unnecessary for this Court to determine whether or not the state regulations

exceeded *the reasonable necessity* for their exercise, and confined the actual decision to the validity of the regulations under the Fourteenth Amendment. This is apparent in the very language of the opinion in *Sproles* v. *Binford* which appellants' briefs quote and requote with such fervor:

> "In exercising its authority over its highways the State is not limited to the raising of revenue for maintenance and reconstruction, or to regulations as to the manner in which vehicles shall be operated, but the State may also prevent the wear and hazards due to excessive weight of load. Limitations of size and weight are manifestly subjects within the broad range of legislative discretion. To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government and *wholly beyond the protection which the general clause of the 14th amendment was intended to secure.*"

An examination of the Findings of Fact of the District Court which tried the case of *Sproles* v. *Binford*,[12] reveals that there was no proof or finding of a substantial burden on interstate commerce.

It was in accordance with the traditional policy of this Court, as expressed in *Cohens* v. *Virginia*, 6 Wheaton 264, 399 and *Euclid* v. *Ambler*, 272 U. S. 365, 397, that the lower Court in the instant case examined the cases of *Morris* v. *Duby* and *Sproles* v. *Binford* (Opinion R. 73):

> "We have given careful consideration to what was said in *Morris* v. *Duby* and *Sproles* v. *Binford*, *supra*, and were at first inclined to think that these decisions were conclusive of the case before us.

[12] Transcript of Record, p. 126-140, Office Supreme Court of United States, Vol. 112, Case 826.

> Upon more mature consideration, we do not think this is correct. It is true that in *Morris* v. *Duby* a state statute prescribing a maximum load weight of 16,500 pounds was upheld, and in *Sproles* v. *Binford* one prescribing a net load of 7,000 pounds; but in neither of these cases was their any such showing of the unreasonableness of the limitation and of the direct burden upon interstate commerce when applied to a system of standard concrete roads as is contained in the record before us. The same is true of *State* v. *Nutt, supra.* In *Sproles* v. *Binford* the court commented on the fact (p. 385) that the roads capable of carrying a greater load than the maximum permitted by the statute did not form a regularly connected system and were scattered throughout the state and that the operations of complainant were conducted over all types of highways and bridges. Here we have a connected system of standard highways of the finest character; and there is no reasonable relation between the limitations complained of and the preservation of safety of such highways. In the light of experience and of scientific knowledge, there is no ground for reasonable difference of opinion as to the gross load limitation of 20,000 pounds not being necessary for the protection of such roads themselves, and there is even less justification for the requirement that the tractor-semi-trailer combination be counted one unit for the purpose of computing gross load."

The appellants contend that State regulations of the use of their highways cannot be subjected to the test of the Commerce Clause because the States own their highways. The term "ownership" is *nomen generalissimum,* and the rights and duties which are the attributes of ownership are as varied as the many characters which ownership may assume.

It is needless in this case to indulge in metaphysical exploration into the concept of ownership and it is need-

less also to engage in constitutional debate as to whether a State might, in the absence of the Federal Highway Acts, close its roads to all commercial transportation, or to the transportation of commodities, or deny the use of its roads entirely to transportation for hire. Out of wisdom born of a recognition by all the States that the Constitution "was framed upon the theory that the peoples of the several States must sink or swim together, and that in the long run prosperity and salvation are in union and not division," [13] the several States and the National Government have by their several conventions pursuant to the Federal Highway Acts rendered it forever unnecessary to consider these questions, and have cooperated in building and maintaining a great system of improved highways, interstate in character, connecting the whole nation and dedicated to the needs of interstate commerce. *Nashville, etc.* v. *Walters,* 294 U. S. 405, 417. Under these acts, it is true, the States retain the ownership of the highways, the easements, and rights of way, and the duty to maintain, but this is not to exclude the equities of the nation in these highways and the protection of the Commerce Clause which attaches to that equity and conditions the rights of ownership to the extent that State regulation of the use of its highways will not unreasonably burden interstate commerce.

We repeat what was said in *Morris* v. *Duby,* 274 U. S. 125:

> "Regulation as to the method of use . . . remains with the States . . . unless the regulation is so *arbitrary and unreasonable as to defeat the useful purposes* for which Congress has made its large contributions to bettering the highway systems of the Union . . . " (emphasis added)

[13] *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 523.

And in *Bush* v. *Maloy*, 267 U. S. 317, it was said:

> "The Federal Aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those Acts make clear the purpose of Congress that *State highways shall be open to interstate* commerce. (Emphasis added.)

In *Buck* v. *Kuykendall*, 267 U. S. 307, this Court considered a State attempt to deny an interstate operator the right to operate within the State on the ground that adequate highway transportation facilities already existed. The State's action was held invalid not only as a burden on interstate commerce and an invasion of federal power, but as the Court said (page 316) because "it also defeats the purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways."

The later decision of this Court in *Bradley* v. *Pub. Util. Commn.* 289 U. S. 92, upholding a State Commission order denying an interstate operator a certificate to operate over a particular highway because of congestion, does not detract from the fundamental principle that a State may not close its highways to interstate commerce. In that decision (page 94) it was said:

> "It is contended that the order of the Commission is void because it excludes Bradley from interstate commerce. The order does not in terms exclude him from operating interstate. The denial of the certificate excludes him merely from Route 20. In specifying the route, Bradley complied with the statutory requirement that an applicant for a certificate shall set forth 'the complete route' over which he desires to operate. Ohio General Code, §614-90(c). But the statute confers upon an applicant the right to amend his application before or after hearing or action by the Commission. §614-91. And it authorizes him, after the certificate is re-

> fused, to 'file a new application or supplement any former application, for the purpose of changing' the route. §614-93. No amendment of the application was made or new application filed. For aught that appears, some alternate or amended route was available on which there was no congestion."

The equity of the people of the United States in the Federal aid highways is indicated by the provisions of Section 14 of the Federal Highway Act of 1921, quoted above, which was designed to assure the permanency of the interstate highway system, by providing that in case any State failed to maintain any Federal aid highway within its boundaries, the Federal Government "shall proceed immediately to have such highway placed in a proper condition of maintenance." The cost of this Federal maintenance is charged against the Federal funds allotted to such State, and upon reimbursement by the State, the amount is to be paid into the Federal highway fund "*for reapportionment among all the States* for the construction of roads" under the Act.

It is tribute to the spirit in which all the States have cooperated under their several conventions with the Federal Government, and witness to the great value to all the States of the national interstate system of highways, that it has not yet been necessary in any State to enforce the drastic provisions of the Federal law.[14]

But of what avail is the protection of this provision of the Federal law, accepted and agreed to by all the States, and to what end the assurance that the physical capacity of the Federal aid highways be maintained, if, in the exercise of a power said by appellants to exist by

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[14] The Bureau of Public Roads and Its Work, Revised June 30, 1930, Thomas H. McDonald.

virtue of the States' "absolute ownership" of these roads, regulations may be enforced which will deny a reasonable use of the Federal aid system to interstate commerce and permit this system in large measure to waste in idleness?

Certainly by virtue of the great national investment in the Federal aid system and the conventions between all of the several States and the Nation, the people of the United States may assert such an equity in the interstate highways as will entitle them to the protection of the corollary of the Commerce Clause that interstate commerce shall not be burdened by State legislation exceeding its reasonable necessity. It cannot be doubted that this was the intent of this Court when it said in *Morris* v. *Duby*, 274 U. S. 135, 145:

> "Regulation as to the method of use, therefore, necessarily remains with the State and can not be interfered with unless the regulation is so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union. . . ."

Nor do we believe that the national equity in the Federal aid system can be dissipated, nor the protection of the Commerce Clause denied, on appellants' theory. (S. C. Brief 95-106) that the primary Federal aid system of highways within the boundaries of a State is an "innocent object", which can be dragged down to the level of its local and rural roads for the conveniences of administration and enforcement. Such a doctrine implies an utter negation of the entire Federal aid program and an unconscionable breach of the conventions pursuant to which this system of highways has been built up.

This attempt to excuse the defeat of the Federal-aid program deserves the same answer as that given by this Court to a similar "reasonable relationship" suggested by counsel in support of the New York Milk Control Act, as it affected interstate commerce:

> "Whatever relation there may be . . . is too remote and indirect to justify obstructions to the normal flow of commerce in its movement between States." *Baldwin* v. *G. A. F. Seelig,* 294 U. S. 511, 524.

Even when determining the validity of State laws under the Fourteenth Amendment, this Court has said:

> "Constitutional guarantees cannot be made to yield to mere convenience." *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, 415,
>
> "Rights guaranteed by the Federal Constitution are not to be so lightly treated, they are superior to this supposed necessity." *Schlesinger* v. *Wisconsin,* 270 U. S. 230.

CONCLUSION.

The record in this case presents for the first time a situation foreseen by this Court in *Morris* v. *Duby,* 274 U. S. 135, when it said that State regulation of the size and weight of motor vehicles in interstate commerce must not be "so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contributions to bettering the highway systems of the Union. . . ."

The stern language of the Supreme Court *In Re Debs,* 158 U. S. 564 (1894) points the true course (591):

> "Up to a recent date commerce, both interstate and international, was mainly by water, and it is not strange that both the legislation of Con-

gress and the cases in the courts have been principally concerned therewith. The fact that in recent years interstate commerce has come mainly to be carried on by railroads and over artificial highways has in no manner narrowed the scope of the constitutional provision, or abridged the power of Congress over such commerce. On the contrary, the same fullness of control exists in the one case as in the other, and the same power to remove obstructions from the one as from the other.

"Constitutional provisions do not change, but their operation extends to new matters as the mode of business and the habits of life of the people vary with each succeeding generation. The law of the common carrier is the same today as when transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so is it with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates today upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop."

When, finally, we come to weigh the National interests against the State interests as they are separately affected by the South Carolina Act, the conclusion is clearly right and necessary: *that under all the circumstances the South Carolina Act exceeds the scope of the State's police power, and goes far beyond the needs of the State to unduly burden the flow of interstate commerce, to defeat the purposes of Federal aid, and to subvert the purposes of the Motor Carrier Act. It therefore violates the Commerce Clause of the Constitution of the United States.*

Any other conclusion of law, based on the evidence in this case, would deny to the National interests the protection which the Commerce Clause was intended to afford.

> "By the Constitution, Art. I, §8, Cl. 3, the power to regulate interstate commerce is expressly committed to Congress and therefore impliedly forbidden to the States. The purpose in this is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile State laws and to insure uniformity in regulation. It means that in the matter of interstate commerce we are a single nation—one and the same people. All the States have assented to it, all are alike bound by it and all are equally protected by it." *Penna.* v. *West Virginia,* 262 U. S. 553, 596.
>
> " . . . The United States form, for many, and for most important purposes, a single nation . . . In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people . . . America has chosen to be in many respects and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent." Chief Justice Marshall in *Cohens* v. *Virginia,* 6 Wheaton, 264, 413.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL., APPELLANTS

v.

BARNWELL BROTHERS, INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

BRIEF ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

OPINION BELOW

The opinion of the District Court for the Eastern District of South Carolina (R. 55) is reported in 17 F. Supp. 803.

JURISDICTION

The opinion and decree of the District Court were filed January 20, 1937 (R. 55–85). The jurisdictional statement was filed by the appellants on

June 1, 1937, as required by Rule 12 of this Court, and probable jurisdiction was noted on October 11, 1937, under the provisions of Section 266 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The Government will confine its argument to the single question whether the laws of the State of South Carolina limiting the weight and width of motor trucks operating in interstate commerce on highways of standard paving is an unreasonable burden on interstate commerce in view of the declared policy and objectives of the Federal Highway Aid Acts and related national legislation.

STATUTES INVOLVED

Sections 2, 4, and 6 of the South Carolina Highway Act (No. 259, Acts of S. C., 1933, p. 340, April 28, 1933) contain the provisions which are the subject of this suit and are set forth in Appendix I of the appellants' brief (pp. 146–148). The Federal Aid Road Act of July 11, 1916 (c. 241, 39 Stat. 355), and the Federal Highway Act of November 9, 1921 (c. 119, 42 Stat. 212), are set forth in the Appendix, *infra*, pp. 30–54.

STATEMENT

This case is an appeal from the final decree of the District Court of the United States for the Eastern District of South Carolina, permanently

enjoining the enforcement of the provisions of a statute of South Carolina which limit the weight and width of motor trucks using its highways in interstate commerce on the ground that such regulations constitute an unreasonable burden on interstate commerce (R. 85). The injunction is restricted to the operations of the plaintiffs below while they are engaging in interstate commerce on certain designated federal aid highways as may be of standard concrete or concrete and asphalt construction (R. 85). The United States submits this brief *amicus curiae* because the question of the constitutional validity of the South Carolina statute affects the success of the Federal Highway Aid program and has direct bearing on an investment of approximately $29,000,000 which the United States has made in the allocation of funds to the State of South Carolina for the construction of an interstate system of highways (R. 252).

For a statement of the essential facts the Court is respectfully referred to the statement contained in the appellants' brief (pp. 3–11).

SUMMARY OF ARGUMENT

The court below properly held that the state regulations limiting the width and weight of motor vehicles are an unreasonable burden on interstate commerce insofar as they apply to traffic on the interstate system of Federal Aid Highways. The objectives of the Federal Aid Highway program are

of significance in determining the reasonableness of the state regulations as against the charge that they unduly burden interstate commerce. The same is true of the obectives of the Federal Motor Carrier Act. Since, as the court below found, 85 per cent of the standard equipment used by motor carriers in interstate commerce exceeds the limitations fixed by South Carolina, and since such equipment conforms to the standards approved by the Federal Bureau of Roads pursuant to the Federal Highway Act of 1921, the interference with interstate commerce is evident. The supposed justification for the South Carolina regulations as a means of preserving the highways and promoting safety cannot be sustained, in view of the evidence and findings to the effect that the gross weight limit established by the State is unreasonable and unrelated to those ends; and that the appropriate basis of regulation is found in limitations on wheel and axle load, as recommended by public highway agencies and generally adopted by States and interstate carriers.

ARGUMENT

THE SOUTH CAROLINA REGULATIONS RESTRICTING THE WEIGHT AND WIDTH OF MOTOR TRUCKS ARE AN UNREASONABLE BURDEN ON INTERSTATE COMMERCE INSOFAR AS THEY AFFECT THE INTERSTATE SYSTEM OF FEDERAL AID HIGHWAYS

Introductory

Section 4 of the South Carolina statute provides that "No person shall operate on any highway any

motor truck or semi-trailer truck whose gross weight, including load, shall exceed 20,000 pounds." Section 6 similarly restricts the use of the highways to trucks or semi-trailer trucks "whose total outside width, including any part of body or load," exceeds 90 inches. Section 2 defines the term "Semi-Trailer Motor Trucks" as "any motor-propelled truck, not operated or driven on fixed rails or tracks, designed to draw, and to support the front end of a semi-trailer," but that "The tractor (or motor propelled truck), together with the semi-trailer shall be considered one unit * * *."

The appellants contend that these highway use restrictions are imposed for the purpose of lowering the cost of highway construction and maintenance and of insuring the safety and protecting the lives of the traveling public, and that they are a valid exercise of the police power of the State (R. 161–162, 179, 187–188, 256–257, 240).

During the trial appellees introduced considerable evidence demonstrating that there is no substantial relationship between gross load weight standards and the conservation of the highways (R. 125, 126–127, 129–130, 133, 135), or the safety of the public using them (R. 121–122, 155). The court below found that "gross weight of vehicles is not a factor to be considered in the preservation of concrete highways * * * and that "a gross weight limitation of 20,000 pounds is unreasonable as a means of preserving the highway" (R. 83;

Finding of Fact No. 22). The court below also found that "the gross load limitation has no reasonable relationship to the safety of the public using the highways" (R. 83, Finding of Fact No. 23).

Likewise, testimony was presented by the appellees to demonstrate that the 90-inch width restriction was not reasonably necessary to insure the safety or protect the lives of the traveling public (R. 236, 275-282). On the basis of this evidence, the court below found that "the width limitation of 90 inches is unreasonable when applied to the standard concrete highways of the state and the arteries of interstate commerce heretofore mentioned, in view of the fact that all other states in the Union permit a width of 96 inches, this is the standard width of trucks engaged in interstate commerce, and the enforcement of the 90 inch limitation would exclude from the highways a large portion of the equipment now used in interstate commerce without material advantage to the safety or preservation of the highways" (R. 83, Finding of Fact No. 24).

The opinion of the court below, delivered by Judge Parker, is comprehensive and painstaking. In considering the reasonableness of the South Carolina highway restrictions emphasis was placed on the existence of the Federal Highway Aid program (R. 67–68). On that point, the court said (17 F. Supp. at 811):

> It must be remembered in this connection that this splendid system of highways was

> constructed to bear the traffic developed by modern conditions; and, because it was realized that such a system would furnish highways for interstate commerce which would facilitate the growth and development of the nation, the Federal Government has supplied to the state of South Carolina funds for their construction amounting to $29,000,000, which has been used for that purpose. While the fact that the federal government has aided in the construction of the highways does not, of course, detract from the power of the state to regulate and control them (*Morris* v. *Duby*, 274 U. S. 135, 143, 47 S. Ct. 548, 549, 71 L. Ed. 966), it is, we think, a circumstance which should be considered in passing upon the reasonableness of a state statute the effect of which would be to drive an important part of interstate commerce from the highways and withdraw them to that extent from the use for which they were intended and for which the federal aid was was granted.

It is in connection with the Federal Highway Aid program and the possible effect of the South Carolina legislation upon the effectuation of its policies that the Government desires to present its views to this Court.

It should be noted that the decree of the court below is limited in its application to "highways of the State of South Carolina numbered 1, 15–A, 17, 21, 25, 29, and 52, or on such portions of other Federal Aid highways as may be of standard concrete

or concrete and asphalt construction" (R. 85). To this extent the issue involved in this case is limited to the reasonableness of state highway restrictions in their application to highways which have been partially constructed through Federal grants-in-aid to the State of South Carolina. But in a larger sense the success of the entire Federal Highway Aid program may depend upon the constitutional validity of state highway use restrictions similar to those involved in this case which place a substantial burden upon the utilization of these Federal Aid Highways for interstate transportation by motor truck (R. 84, Finding of Fact No. 26).

A. *The Significance of the Federal Highway Acts*

On several occasions this Court has recognized the propriety of considering the purposes and objectives of the Federal Highway Aid program in passing upon the reasonableness of local regulations pertaining to the use of interstate highways which are a part of the national system. In *Bush Co.* v. *Maloy,* 267 U. S. 317, this Court said (at p. 324):

> The federal-aid legislation is of significance, not because of the aid given by the United States for the construction of particular highways, but because those acts make clear the purpose of Congress that state highways shall be open to interstate commerce.

Again, in *Morris* v. *Duby*, 274 U. S. 135, this Court said that, although regulation as to the method of use of highways remained in the States, such regulation could not be "so arbitrary and unreasonable as to defeat the useful purposes for which Congress has made its large contribution to bettering the highway systems of the Union * * *" 274 U. S. at p. 145). And in *Buck* v. *Kuykendall*, 267 U. S. 307, this Court held that a statute of the State of Washington which sought to regulate the use of its highways by requiring interstate motor carriers to obtain certificates of convenience and necessity before they were permitted to use the highways was an unreasonable burden on interstate commerce because the Act had no relation "to safety or to conservation of the highways" (p. 315) and "defeats the purpose of Congress expressed in the legislation giving federal aid for the construction of interstate highways" (p. 316). Recently, this Court took occasion to consider in detail the basic purposes and policy of the Federal Highway Aid program in connection with a case which involved the validity of a statute of the State of Tennessee requiring railroads to pay one-half of the expense involved in eliminating grade crossings. *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405. That decision not only recognized the propriety of considering the Federal Highway Aid program in connection with the reasonableness of local highway regulations but gave definite legal

significance to the functional character of the highways comprising the national interstate system constructed under these Federal Acts (294 U. S. at 417 *et seq.*). It is submitted that these decisions clearly establish that in determining the constitutionality of state highway use restrictions which indirectly affect interstate motor transportation over federal aid highways the declared policy and purposes of the Federal Highway Aid Acts must be considered.

B. *The Federal Highway Aid Program—a Cooperative Enterprise*

The early history of the attempts of the Federal Government to deal with problems of highway improvement and transportation have been so fully presented by the appellees in their brief (pp. 10–22) that the Government sees no reason for duplicating that account. It is enough to point out that since 1806 the Federal Government has actively participated in the development and improvement of interstate highways throughout the nation.

The Federal Aid Road Act of July 11, 1916 (c. 241, 39 Stat. 355), was the outgrowth of a series of investigations by the Federal Government in the highway field and was due in a large measure to public agitation for Government funds for highway development. (Report of the Select Committee to Investigate the Executive Agencies of the Government, No. 12, pursuant to Senate Resolution

No. 217, 74th Cong., 2d Sess., 1937.) This legislation marked the beginning of an intensive effort on the part of the Federal Government to cooperate with the States in the development of a national system of interstate highways. The Act appropriated $75,000,000 to be allotted over a five-year period by the Secretary of Agriculture to the various States. These funds could be applied in the discretion of the Secretary to any roads "over which the United States mails now are or may hereafter be transported." The Act also established an arithmetical formula for an allocation among the various States of the total funds available and conditioned the eligibility of States for grants-in-aid upon the existence of State Highway Departments. The legislation also enabled the Federal Government to protect its investment in these federal-aid roads by withdrawing further grants from States which failed to maintain these roads according to specified standards, and it empowered the Secretary of Agriculture to make all necessary rules and regulations for carrying out the provisions of the law. The statute set up a "matching system" by requiring the State to bear at least one-half the cost of each federal-aid project approved by the Secretary. A provision was included in the Act that no money apportioned under the law to any State could be expended therein until the local legislature had consented to the provisions of the Road Act. By the beginning of the fiscal year 1918 every State in the Union, including

South Carolina, had given adequate assent to the terms of the Act. (Report of the Director of the Office of Public Roads and Rural Engineering, p. 1, 1917.) Although the Road Act of 1916 placed ample authority in the hands of the Federal Government to determine the vital elements in highway development—the location of projects, physical specifications as to type of surfacing, width, strength, elevation, etc., and priority of projects—it was soon apparent that there were important defects in this Act which tended to impede the development of a uniform national system of interstate highways. In 1919 the Chief of the Bureau of Public Roads pointed out that the post road requirements of the 1916 Act seriously handicapped the state use of Federal funds. (Report of the Chief of the Bureau of Public Roads, 1919.) The Post Office Appropriation Act of February 28, 1919, c. 69, 40 Stat. 1200, broadened the definition of rural post roads so as to include highways over which main traffic might be handled.

In order to cure many of the other obvious defects in the Act of 1916, Congress in 1921 passed the Federal Highway Act (c. 119, 42 Stat. 212) to give direction to future Federal cooperation with the States in the construction and maintenance of a national system of interstate highways. Section 6 of this Act provided that in approving projects to receive federal-aid preference should be given "to such projects as will expedite the completion of

an adequate and connected system of highways, interstate in character." This section also specified that the Secretary of Agriculture in cooperation with each State Highway Department should designate a system of highways not exceeding 7 per cent of the total mileage in each State and that the application of Federal funds was to be limited to this designated system. State highway departments were given authority initially to select the mileage to constitute this 7 per cent system, but final approval of the designated system was placed in the hands of the Secretary of Agriculture (Section 6). By these provisions it was made more certain that Federal moneys expended in the future would not be dissipated over the state systems without regard to the needs of an interstate system of highways. Furthermore, Section 8 of the Act provided "That only such durable types of surface and kinds of materials shall be adopted for the construction and reconstruction of any highway which is a part of the primary or interstate and secondary or intercounty systems as will adequately meet the existing and probable future traffic needs and conditions thereon." To insure the effective administration of this section, the Secretary of Agriculture was authorized to approve the types and width of construction and reconstruction and the character of improvement, repair, and maintenance in each case where a request was made for allocation of Federal funds.

The foregoing legislation constitutes the basic statutory provisions under which the Federal Highway Aid policy has been administered from 1916 to the present time. Above all else it indicates that the Federal Government has entered into a cooperative undertaking with the States for the development of a national interconnected and interstate highway system which would be doubly valuable because it would be integrated with the various state systems and local "feeder" and secondary highways. Between 1916 and 1936 the Federal Government had paid to the various States the sum of $2,197,634,970.13; and approximately $500,000,000 has been apportioned, but not yet paid out, for the development of selected federal-aid system (R. 137, 252). More than half of this total sum has been paid to the States during the decade 1926 to 1936. During the entire period of Federal aid the State of South Carolina has been allotted $29,741,137.63 by the Federal Government for the construction of such highways, but more than 70 per cent of this sum was paid during the decade between 1926–1936 (R. 252). As a result of this tremendous national investment and the combined efforts of the state and Federal governments there now exists a national system of improved highways which, from a standpoint of physical characteristics, permits the relatively unimpeded movement of interstate transportation from border to border. (Report of Selected Committee to Investigate

Executive Agencies of the Government, p. 12, No. 12, pursuant to Senate Resolution No. 217, 74th Cong., 2d Sess., 1937.)

In the exercise of the powers which were conferred upon the Secretary of Agriculture by Section 8 of the Act of 1921 "approve the types and width of construction and reconstruction and the character of improvement, repair, and maintenance" of the highways in what is known as the 7 per cent system, the Bureau of Public Roads has obtained substantial uniformity in design and capacity for the main interstate highways traversing the country. The standard of weight capacity for these federal-aid highways approved by the Bureau is 16,000 pounds per axle for high pressure and 18,000 pounds per axle for low pressure pneumatic tires (or 8,000 and 9,000 pounds per wheel), and it was for these capacities that the Bureau authorized and approved the construction of the main highways, including those of South Carolina, in the interconnected interstate system. (Testimony of Thomas McDonald, Chief of the United States Bureau of Public Roads before the Interstate Commerce Commission, Docket No. 23400.)

In 1934 the Bureau of Public Roads, under authority of the Federal Highway Act of 1921, published a "Uniform Act Regulating Traffic on Highways," as revised and approved by the Fourth National Conference on Street and Highway Safety, which was recommended for adoption by all the

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States (R. 275). By Section 145 of this Uniform Act (R. 277) wheel loads not in excess of 8,000 and 9,000 pounds and axle loads not in excess of 16,000 and 18,000 pounds are recommended, depending upon whether high pressure or low pressure pneumatic tires are used. As will be seen from the Table of States printed in the appellees' brief (p. 79) all but a few of the States have regulatory provisions in substantial conformity to the Uniform Act approved by the Bureau of Public Roads.

C. *Interstate Motor Transportation over Federal Aid Highways in the South Atlantic Region*

In the development of the national interstate highway system and the growth of commercial highway transportation over this system, the South Atlantic region of the United States has played a prominent role. The court below indicated that there was abundant evidence to sustain the conclusion that within the past decade there has been a great development in interstate commerce by truck and a corresponding change and development of industry in the Southeastern part of the United States which was largely contributed to by the advent of truck transportation (17 F. Supp. 803, at 810). The produce industry, the textile industry, the fertilizer industry, the lumber industry and many other industries have changed in large measure their methods of doing business as a result of the facilities afforded them by the use of trucks in

interstate commerce (R. 100–117; 142–158). The evidence further demonstrates that the State of South Carolina has the best system of highways in the Southeastern part of the United States (R. 180–184) and as good as any in the country (R. 180). There are within the State itself 60,000 miles of roads of all kinds of which 6,100 miles are embraced in a state highway system. Of this last number 2,417 miles are of standard pavement, and the arteries of interstate commerce are of this character with the exception of a few short lengths (R. 159). The state highway system in South Carolina has cost approximately $111,000,000 (R. 173–174), of which $29,741,137.63 was received from the Federal Government (R. 137). No one road in the State is in its entirety a Federal Aid project; that is, portions of the road were built with Federal aid, while other portions were built entirely with state funds (R. 191–192). The total mileage of completed Federal Aid projects within the State of South Carolina is approximately 2,797.8 miles, of which 795.8 miles are of concrete and 193.5 miles are of bituminous concrete (R. 253, Exhibit 4). However, the evidence introduced by the appellees indicates that there are 4,322 miles of road in South Carolina embraced within the approved Federal Highway Aid system (R. 271–272, Exhibit 11). The standard paving used in the construction of the South Carolina highway system is not materially different from the modern paving used in

most of the other States of the Union (R. 160, 161). For the most part it varies from 18 to 20 feet in width, 7½ or 8 inches in thickness at the edges and 6 or 6½ inches in thickness at the center (R. 81, 126).

According to the estimates made by engineers testifying for the appellees these roads are capable of sustaining without injury a wheel load of 8,000 or 8,500 pounds and an axle load of from 16,000 to 18,000 pounds (R. 125, 126–127). These estimates are in accord with the approved standards established by the Bureau of Public Roads pursuant to its authority under the Federal Highway Act of 1921 (R. 275). Furthermore, the American Association of State Highway Officials, composed of the enforcement and administrative officials of all the State Highway Departments, has indicated that the gross weight load standard adopted by the South Carolina statute is not a factor to be considered in the enactment of legislation to conserve and protect the highways of the State (R. 279). This association of qualified experts has emphatically stated that "Highway stresses are ruled by *wheel loads* and not by *gross loads*" and "so far as road surfaces are concerned, the limitation of axle or wheel loads gives full protection, let gross loads be what they may" (R. 70).

D. *The Burdens Imposed by the South Carolina Highway Act*

The evidence in the record and the findings of the court below clearly demonstrate the burdens which

the enforcement of the South Carolina regulations will impose upon motor transportation through that State. Rather than attempt to summarize the evidence introduced by appellees the Government will merely set forth the findings made by the court below to which the appellants took no exception in their assignments of error. The pertinent findings of fact are as follows:

> 7. That the interstate motor transportation industry has grown and developed in the past five years to be an established industry. That standard equipment operated by motor carriers in interstate commerce consists of trucks and tractor semi-trailers, and that 85 per cent to 90 per cent of this equipment is 96 inches in width and weighs more than 20,000 pounds gross; that enforcement of the South Carolina law would result in the obstruction of the flow of interstate commerce into, out of, and across the State of South Carolina because it would necessitate the transferring of commodities to and from trucks of the size and weight prescribed by said law, with a consequent increase in the cost of interstate transportation and a discrimination against South Carolina shippers and others shipping into and across South Carolina, and would render it practically impossible for a large part of interstate commerce now conducted by truck to use the roads of that state (R. 78).
>
> 8. That weight and size of motor trucks are important factors in the fixing of inter-

state rates and that enforcement of the South Carolina law under consideration would necessitate increase of rates for transportation of commodities into, out of, and across South Carolina, would prevent the interchange of motor truck equipment and the establishment of through routes and joint rates on shipments moving into, out of, and across South Carolina (R. 78).

9. That the development of motor truck transportation has been of great benefit to the textile industry because it has permitted manufacturers to supply customers with commodities in smaller quantities at more frequent intervals, without increased cost, and the customers' demand for this service necessitates the use of motor trucks. That the standard motor trucks supplying this service are 96 inches in width and when properly loaded weigh more than 20,000 pounds gross. That enforcement of the South Carolina law would cause delay in transit and increase the cost of intersate transportation of textiles into, out of, and across the State of South Carolina and would result in discrimination against South Carolina textile mills in favor of competitors in other states (R. 78).

10. That the continued operation and development of large-scale truck farming and the shipping of vegetables out of South Carolina in interstate commerce is dependent upon the peculiar service rendered by motor trucks in the transportation of produce from

roadside farms to large and distant markets quickly and economically. That truck farmers and vegetable growers depend, for interstate transportation of their produce, on motor trucks operated not by the farmers themselves but by transportation companies whose trucks move about the country with the seasons. That these trucks, and particularly the refrigerator trucks upon which the farmers depend for shipment of perishables, exceed the size and weight limitations prescribed by the law of South Carolina. That enforcement of the said law would discriminate against South Carolina truck farmers and vegetable growers in favor of their competitors in other states and would injure if not destroy this industry in South Carolina (R. 79).

11. That a large amount of fertilizer is shipped out of South Carolina in interstate commerce by motor truck and delivered to farmers at the field for immediate use; that this service cannot be rendered by other transportation agencies; that the product has a low value in proportion to weight, and enforcement of the South Carolina law would increase the cost of fertilizer to consumers and jeopardize the fertilizer industry in South Carolina (R. 79).

12. That interstate movement of household furniture and effects by motor truck has developed with the advent of good roads; that railroads do not offer adequate service and do not compete with trucks in this business; that because of the weight and bulk of

furniture it is necessary that loads exceed the size and weight limitations prescribed by the law of South Carolina; that enforcement of the South Carolina law would increase the cost and curtail the efficiency of this service to the public (R. 79).

13. That the business of shipping lumber in interstate commerce from mills in South Carolina has developed with the advent of good roads and motor trucks; that motor transportation enables the mills of South Carolina to meet the demand of customers for delivery of lumber at the point of use; that if the South Carolina law is enforced the interstate movement of this commodity by truck will practically cease and South Carolina lumber mills will be forced to ship by rail at increased cost of transportation and serious curtailment of service both in time and convenience to the consuming public (R. 79).

14. That with the advent of good roads and motor truck transportation the furniture manufacturers have changed their method of doing business and have commenced shipping large quantities of furniture in interstate commerce by motor truck; that this method of transportation is now important because customers demand quick shipments in small lots and this service connot be supplied by railroads; that the transportation of this commodity necessitates the use of trucks 96 inches in width and weighing more than 20,000 pounds gross; that en-

forcement of the South Carolina law under consideration would interfere with the traffic and would result in discrimination against manufacturers shipping furniture out of and across South Carolina in favor of their competitors (R. 80).

15. That the port of Charleston, S. C., handles a large volume of inbound and outbound traffic moving in interstate and foreign commerce; that in recent years the percentage of this interstate and foreign traffic moving to and from the port of Charleston in motor trucks has steadily increased, and at the present time the records of three of the important inter-coastal steamship lines operating in and out of Charleston reflect, respectively, 24 per cent, 58 per cent, and 40 per cent of all tonnage moving by truck; that shippers and consignees rely upon and demand the service now offered by motor trucks because of advantageous rates and because motor trucks offer transportation facilities which cannot be duplicated by other transportation agencies; that motor trucks now operating in and out of Charleston and carrying cargoes in interstate commerce to and from the port are of the standard type, 96 inches in width and weighing more than 20,000 pounds gross; that many of the commodities moving in interstate commerce by motor truck to and from the port of Charleston cannot be profitably transported in trucks within the weight and

size limitations prescribed by the law of South Carolina; that enforcement of the South Carolina law would result in the diversion of large cargoes, normally consigned to the port of Charleston, to other competing ports in other states along the Atlantic seaboard (R. 80).

16. That flour is one of the major commodities moving into the port of Charleston and that a large part of it is transported in interstate commerce by motor truck; that truck transportation of this commodity is necessary because speed of delivery is essential to prevent deterioration and meet the demand of customers and also because numerous small communities are dependent on shipments in smaller quantities than can be profitably shipped by rail; that the average pay load of a motor vehicle hauling flour is 20,000 pounds, making a gross load of about 30,000 pounds; that enforcement of the law under consideration will increase the cost of transportation (R. 81).

E. *The Significance of the Motor Carrier Act*

The discussion above concerning the significance of the Federal Aid Acts and their administration, in relation to the principle forbidding unreasonable burdens on interstate commerce, is likewise applicable to Part II of the Interstate Commerce Act (Motor Carrier Act, 1935). The District Court found that the enforcement of the South Carolina regulations will defeat the purposes and policies

of Congress as expressed in this Act. The Government makes no contention here that the Federal legislation regulating motor carriers supersedes the State's power to regulate the size and weight of motor vehicles in interstate commerce, and it is apparent from the opinion of the court below that it gave no such significance to this legislation (R. 174). Concerning this aspect of the case the court below said (17 F. Supp. at pp. 814–815):

> There is another angle from which the reasonableness of police regulations burdening interstate commerce in this way must be judged. Not only has Congress aided in the construction of the roads so that they may become highways of such commerce, but in the enactment of the motor carriers' act, it has recognized truck traffic as a legitimate part of that commerce essential to the welfare of the public and subject to regulation for that reason. As said of Federal aid legislation in *Bush & Sons Co.* v. *Maloy*, 267 U. S. 317, 324, 45 S. Ct. 326, 327, 69 L. Ed. 627, this legislation regulating motor carriers is of significance because it makes clear the purpose of Congress that state highways shall be open to commerce of that character. Congress has not attempted to regulate size and weight and there are great practical difficulties in the way of such regulation by Congress. It is of great importance, therefore, that regulation of this matter by the states be held

within reasonable bounds, and that they be not permitted, under guise of exercising the police power, to exclude from their highways by unreasonable regulations the interstate commerce which Congress is regulating in the public interest and for the carrying of which it has aided in the construction of roads that form parts of a great national system of highways.

The importance of the Motor Carrier Act and its administration as a factor in determining the reasonableness of state highway regulation affecting motor carriers is demonstrated by recent decisions of the Interstate Commerce Commission applying the Act to specific situations. (*Edwin A. Bowles Common Carrier Application,* 1 M. C. C. 589, March 13, 1937; *Pennsylvania Truck Lines, Inc., Acquisition of Control, Etc.,* 1 M. C. C. 101, October 8, 1936.) In the light of the declared purposes of Congress in that Act "to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation and among such carriers in the public interest", to "promote adequate, economical, and efficient service by motor carriers," and to "develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense" (Section 202 (a)), the Government contends that this legislation, also, supports the application of

the commerce clause against state legislation which needlessly subverts and defeats the declared purposes and policies of Congress. It is recognized that, if the needs of the State are such as to demand the regulations which it seeks to enforce, then the defeat of the purposes and policies of Congress is unavoidable under our constitutional system. But it must equally be true that where the regulations are not in fact demanded by the reasonable necessities of the State, and other regulations or methods of limitation would satisfy its reasonable necessities, the State may not arbitrarily ignore the demands of interstate commerce and arbitrarily defeat the purposes and policies of Congress.

F. *Previous Decisions of this Court*

There have been at least two decisions of this Court involving the validity of state regulation of sizes and weight of motor vehicles. These cases are *Morris* v. *Duby*, 274 U. S. 135, and *Sproles* v. *Binford*, 286 U. S. 374. In both of these cases the Court upheld the reasonableness of the state highway restrictions.

The Government is of the opinion that the decisions in those cases are not controlling when applied to the evidence and findings presented by the instant case. In *Morris* v. *Duby, supra*, the effect of the state regulation was considered only in its application to an isolated stretch of highway approximately 22 miles long. The instant case in-

volves a broader issue, since it concerns the utilization of the Federal Aid Highways crossing the State of South Carolina which are an integral part of the channels of interstate commerce for the entire Southeastern section of the United States. In *Sproles* v. *Binford, supra,* the issue as to the burden on interstate commerce was neither substantially alleged nor considered by the lower court. But more important, in neither of these cases was there any attempt made to introduce comprehensive testimony relative to the precise burden on interstate commerce which was imposed by the state highway restrictions. The same observation may be made with respect to the decisions of the Supreme Court of South Carolina in *State* v. *John P. Nutt Co.,* 180 S. C. 19, upholding the validity of the South Carolina Highway Act, which is now being attacked by the appellees. This Court denied a petition for certiorari in that case (297 U. S. 724), but, as in the other cases mentioned above, there had been no attempt in the lower courts to support the allegation of unreasonableness of the burden on interstate commerce by the introduction of evidence or testimony to sustain such a contention. None of these cases prevents this Court from examining the record in the instant case to determine the question of the burden on interstate commerce in the light of the evidence which has been introduced by the appellees to sustain their contention.

CONCLUSION

It is respectfully submitted that the decree of the District Court of the United States for the Eastern District of South Carolina should be affirmed.

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JANUARY 1938.

APPENDIX

The Federal Aid Road Act of July 11, 1916, c. 241, 39 Stat. 355–359, provides:

That the Secretary of Agriculture is authorized to cooperate with the States, through their respective State highway departments, in the construction of rural post roads; but no money apportioned under this Act to any State shall be expended therein until its legislature shall have assented to the provisions of this Act, except that, until the final adjournment of the first regular session of the legislature held after the passage of this Act, the assent of the governor of the State shall be sufficient. The Secretary of Agriculture and the State highway department of each State shall agree upon the roads to be constructed therein and the character and method of construction: *Provided,* That all roads constructed under the provisions of this Act shall be free from tolls of all kinds.

SEC. 2. That for the purpose of this Act the term "rural post road" shall be construed to mean any public road over which the United States mails now are or may hereafter be transported, excluding every street and road in a place having a population, as shown by the latest available Federal census, of two thousand five hundred or more, except that portion of any such street or road along which the houses average more than two hundred feet apart; the term "State highway department" shall be construed to include any department of another name, or commission, or official or officials,

of a State empowered, under its laws, to exercise the functions ordinarily exercised by a State highway department; the term "construction" shall be construed to include reconstruction and improvement of roads; "properly maintained" as used herein shall be construed to mean the making of needed repairs and the preservation of a reasonably smooth surface considering the type of the road; but shall not be held to include extraordinary repairs, nor reconstruction; necessary bridges and culverts shall be deemed parts of the respective roads covered by the provisions of this Act.

SEC. 3. That for the purpose of carrying out the provisions of this Act there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the fiscal year ending June thirtieth, nineteen hundred and seventeen, the sum of $5,000,000; for the fiscal year ending June thirtieth, nineteen hundred and eighteen, the sum of $10,000,000; for the fiscal year ending June thirtieth, nineteen hundred and nineteen, the sum of $15,000,000; for the fiscal year ending June thirtieth, nineteen hundred and twenty, the sum of $20,000,000; and for the fiscal year ending June thirtieth, nineteen hundred and twenty-one, the sum of $25,000,000. So much of the appropriation apportioned to any State for any fiscal year as remains unexpended at the close thereof shall be available for expenditure in that State until the close of the succeeding fiscal year, except that amounts apportioned for any fiscal year to any State which has not a State highway department shall be available for expenditure in that State until the close of the third fiscal year succeeding the close of the fiscal year for which such appor-

tionment was made. Any amount apportioned under the provisions of this Act unexpended at the end of the period during which it is available for expenditure under the terms of this section shall be reapportioned, within sixty days thereafter, to all the States in the same manner and on the same basis, and certified to the Secretary of the Treasury and to the State highway departments and to the governors of States having no State highway departments in the same way as if it were being apportioned under this Act for the first time: *Provided,* That in States where the constitution prohibits the State from engaging in any work of internal improvements, then the amount of the appropriation under this Act apportioned to any such State shall be turned over to the highway department of the State or to the governor of said State to be expended under the provisions of this Act and under the rules and regulations of the Department of Agriculture, when any number of counties in any such State shall appropriate or provide the proportion or share needed to be raised in order to entitle such State to its part of the appropriation apportioned under this Act.

SEC. 4. That so much, not to exceed three per centum, of the appropriation for any fiscal year made by or under this Act as the Secretary of Agriculture may estimate to be necessary for administering the provisions of this Act shall be deducted for that purpose, available until expended. Within sixty days after the close of each fiscal year the Secretary of Agriculture shall determine what part, if any, of the sums theretofore deducted for administering the provisions of this Act will not be needed for that purpose

and apportion such part, if any, for the fiscal year then current in the same manner and on the same basis, and certify it to the Secretary of the Treasury and to the State highway departments, and to the governors of States having no State highway departments, in the same way as other amounts authorized by this Act to be apportioned among all the States for such current fiscal year. The Secretary of Agriculture, after making the deduction authorized by this section, shall apportion the remainder of the appropriation for each fiscal year among the several States in the following manner: One-third in the ratio which the area of each State bears to the total area of all the States; one-third in the ratio which the population of each State bears to the total population of all the States, as shown by the latest available Federal census; one-third in the ratio which the mileage of rural delivery routes and star routes in each State bears to the total mileage of rural delivery routes and star routes in all the States, at the close of the next preceding fiscal year, as shown by the certificate of the Postmaster General, which he is directed to make and furnish annually to the Secretary of Agriculture.

SEC. 5. That within sixty days after the approval of this Act the Secretary of Agriculture shall certify to the Secretary of the Treasury and to each State highway department and to the governor of each State having no State highway department the sum which he has estimated to be deducted for administering the provisions of this Act and the sum which he has apportioned to each State for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and on or before January twentieth next preceding

the commencement of each succeeding fiscal year shall make like certificates for such fiscal year.

SEC. 6. That any State desiring to avail itself of the benefits of this Act shall, by its State highway department, submit to the Secretary of Agriculture project statements setting forth proposed construction of any rural post road or roads therein. If the Secretary of Agriculture approve a project, the State highway department shall furnish to him such surveys, plans, specifications, and estimates therefor as he may require: *Provided, however,* That the Secretary of Agriculture shall approve only such projects as may be substantial in character and the expenditure of funds hereby authorized shall be applied only to such improvements. Items included for engineering, inspection, and unforeseen contingencies shall not exceed ten per centum of the total estimated cost of the work. If the Secretary of Agriculture approve the plans, specifications, and estimates, he shall notify the State highway department and immediately certify the fact to the Secretary of the Treasury. The Secretary of the Treasury shall thereupon set aside the share of the United States payable under this Act on account of such project, which shall not exceed fifty per centum of the total estimated cost thereof. No payment of any money apportioned under this Act shall be made on any project until such statement of the project, and the plans, specifications, and estimates therefor, shall have been submitted to and approved by the Secretary of Agriculture.

When the Secretary of Agriculture shall find that any project so approved by him has been constructed in compliance with said

plans and specifications he shall cause to be paid to the proper authority of said State the amount set aside for said project: *Provided,* That the Secretary of Agriculture may, in his discretion, from time to time make payments on said construction as the same progresses, but these payments including previous payments, if any, shall not be more than the United States' pro rata part of the value of the labor and materials which have been actually put into said construction in conformity to said plans and specifications; nor shall any such payment be in excess of $10,000 per mile, exclusive of the cost of bridges of more than twenty feet clear span. The construction work and labor in each State shall be done in accordance with its laws, and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations made pursuant to this Act.

The Secretary of Agriculture and the State highway department of each State may jointly determine at what times, and in what amounts, payments, as work progresses, shall be made under this Act. Such payments shall be made by the Secretary of the Treasury, on warrants drawn by the Secretary of Agriculture, to such officials, or officials, or depository, as may be designated by the State highway department and authorized under the laws of the State to receive public funds of the State or county.

SEC. 7. To maintain the roads constructed under the provisions of this Act shall be the duty of the States, or their civil subdivisions, according to the laws of the several States. If at any time the Secretary of Agriculture

shall find that any road in any State constructed under the provisions of this Act is not being properly maintained he shall give notice of such fact to the highway department of such State and if within four months from the receipt of said notice said road has not been put in a proper condition of maintenance then the Secretary of Agriculture shall thereafter refuse to approve any project for road construction in said State, or the civil subdivision thereof, as the fact may be, whose duty it is to maintain said road, until it has been put in a condition of proper maintenance.

SEC. 8. That there is hereby appropriated and made available until expended, out of any moneys in the National Treasury not otherwise appropriated, the sum of $1,000,000 for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and each fiscal year thereafter, up to and including the fiscal year ending June thirtieth, nineteen hundred and twenty-six, in all $10,000,000, to be available until expended under the supervision of the Secretary of Agriculture, upon request from the proper officers of the State, Territory, or county for the survey, construction, and maintenance of roads and trails within or only partly within the national forests, when necessary for the use and development of resources upon which communities within and adjacent to the national forests are dependent: *Provided,* That the State, Territory, or county shall enter into a cooperative agreement with the Secretary of Agriculture for the survey, construction, and maintenance of such roads or trails upon a basis equitable to both the State, Territory, or county, and the United States: *And provided also,* That

the aggregate expenditures in any State, Territory, or county shall not exceed ten per centum of the value, as determined by the Secretary of Agriculture, of the timber and forage resources which are or will be available for income upon the national forest lands within the respective county or counties wherein the roads or trails will be constructed; and the Secretary of Agriculture shall make annual report to Congress of the amounts expended hereunder.

That immediately upon the execution of any cooperative agreement hereunder the Secretary of Agriculture shall notify the Secretary of the Treasury of the amount to be expended by the United States within or adjacent to any national forest thereunder, and beginning with the next fiscal year and each fiscal year thereafter the Secretary of the Treasury shall apply from any and all revenues from such forest ten per centum thereof to reimburse the United States for expenditures made under such agreement until the whole amount advanced under such agreement shall have been returned from the receipts from such national forest.

SEC. 9. That out of the appropriations made by or under this Act, the Secretary of Agriculture is authorized to employ such assistants, clerks, and other persons in the city of Washington and elsewhere, to be taken from the eligible lists of the Civil Service Commission, to rent buildings outside of the city of Washington, to purchase such supplies, material, equipment, office fixtures, and apparatus, and to incur such travel and other expense as he may deem necessary for carrying out the purposes of this Act.

SEC. 10. That the Secretary of Agriculture is authorized to make rules and regulations for carrying out the provisions of this Act.

SEC. 11. That this Act shall be in force from the date of its passage.

Approved, July 11, 1916.

The Federal Highway Act of November 9, 1921, c. 119, 42 Stat. 212–219, provides:

That this Act may be cited as the Federal Highway Act.

SEC. 2. That, when used in this Act, unless the context indicates otherwise—

The term "Federal Aid Act" means the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, as amended by sections 5 and 6 of an Act entitled "An Act making appropriations for the service of the Post Office Department for the fiscal year ending June 30, 1920, and for other purposes," approved February 28, 1919, and all other Acts amendatory thereof or supplementary thereto.

The term "highway" includes rights of way, bridges, drainage structures, signs, guard rails, and protective structures in connection with highways, but shall not include any highway or street in a municipality having a population of two thousand five hundred or more as shown by the last available census, except that portion of any such highway or street along which within a distance of one mile the houses average more than two hundred feet apart.

The term "State highway department" includes any State department, commission, board, or official having adequate powers and suitably equipped and organized to discharge to the satisfaction of the Secretary of Agriculture the duties herein required.

The term "maintenance" means the constant making of needed repairs to preserve a smooth surfaced highway.

The term "construction" means the supervising, inspecting, actual building, and all expenses incidental to the construction of a highway, except locating, surveying, mapping, and costs of rights of way.

The term "reconstruction" means a widening or a rebuilding of the highway or any portion thereof to make it a continuous road, and of sufficient width and strength to care adequately for traffic needs.

The term "forest roads" means roads wholly or partly within or adjacent to and serving the national forests.

The term "State funds" includes for the purposes of this Act funds raised under the authority of the State, or any political or other subdivision thereof, and made available for expenditure under the direct control of the State highway department.

SEC. 3. All powers and duties of the Council of National Defense under the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes," approved August 29, 1916, in relation to highway or highway transport, are hereby transferred to the Secretary of Agriculture, and the Council of National Defense is directed to turn over to the Secretary of Agriculture the equipment, material, supplies, papers, maps, and documents utilized in the exercise of such powers. The powers and duties of agencies dealing with highways in the national parks or in military or naval reservations under the control of the United States Army or Navy, or with highways used principally for military or naval

purposes, shall not be taken over by the Secretary of Agriculture, but such highways shall remain under the control and jurisdiction of such agencies.

The Secretary of Agriculture is authorized to cooperate with the State highway departments, and with the Department of the Interior in the construction of public highways within Indian reservations, and to pay the amount assumed therefor from the funds allotted or apportioned under this Act to the State wherein the reservation is located.

SEC. 4. That the Secretary of Agriculture shall establish an accounting division which shall devise and install a proper method of keeping the accounts.

SEC. 5. That the Secretary of War be, and he is hereby, authorized and directed to transfer to the Secretary of Agriculture, upon his request, all war material, equipment, and supplies now or hereafter declared surplus from stock now on hand and not needed for the purposes of the War Department but suitable for use in the improvement of highways, and that the same shall be distributed among the highway departments of the several States to be used in the construction, reconstruction, and maintenance of highways, such distribution to be upon the same basis as that hereinafter provided for in this Act in the distribution of Federal-aid fund: *Provided,* That the Secretary of Agriculture, in his discretion, may reserve from such distribution not to exceed 10 per centum of such material, equipment, and supplies for use in the construction, reconstruction, and maintenance of national forest roads or other roads constructed, reconstructed, or maintained under his direct supervision.

SEC. 6. That in approving projects to receive Federal aid under the provisions of this

Act the Secretary of Agriculture shall give preference to such projects as will expedite the completion of an adequate and connected system of highways, interstate in character.

Before any projects are approved in any State, such State, through its State highway department, shall select or designate a system of highways not to exceed 7 per centum of the total highway mileage of such State as shown by the records of the State highway department at the time of the passage of this Act.

Upon this system all Federal-aid apportionments shall be expended.

Highways which may receive Federal aid shall be divided into two classes, one of which shall be known as primary or interstate highways, and shall not exceed three-sevenths of the total mileage which may receive Federal aid, and the other which shall connect or correlate therewith and be known as secondary or intercounty highways, and shall consist of the remainder of the mileage which may receive Federal aid.

The Secretary of Agriculture shall have authority to approve in whole or in part the systems as designated or to require modifications or revisions thereof: *Provided,* That the States shall submit to the Secretary of Agriculture for his approval any proposed revisions of the designated systems of highways above provided for.

Not more than 60 per centum of all Federal aid allotted to any State shall be expended upon the primary or interstate highways until provision has been made for the improvement of the entire system of such highways: *Provided,* That with the approval of any State highway department the Secretary of Agricultural may approve the ex-

penditure of more than 60 per centum of the Federal aid apportioned to such State upon the primary or interstate highways in such State.

The Secretary of Agriculture may approve projects submitted by the State highway departments prior to the selection, designation, and approval of the system of Federal-aid highways herein provided for if he may reasonably anticipate that such projects will become a part of such system.

Whenever provision has been made by any State for the completion and maintenance of a system of primary or interstate and secondary or intercounty highways equal to 7 per centum of the total mileage of such State, as required by this Act, said State, through its State highway department, by and with the approval of the Secretary of Agriculture, is hereby authorized to add to the mileage of primary or interstate and secondary or intercounty systems as funds become available for the construction and maintenance of such additional mileage.

SEC. 7. That before any project shall be approved by the Secretary of Agriculture for any State such State shall make provisions for State funds required each year of such States by this Act for construction, reconstruction, and maintenance of all Federal-aid highways within the State, which funds shall be under the direct control of the State highway department.

SEC. 8. That only such durable types of surface and kinds of materials shall be adopted for the construction and reconstruction of any highway which is a part of the primary or interstate and secondary or intercounty systems as will adequately meet the existing and probable future traffic needs

and conditions thereon. The Secretary of Agriculture shall approve the types and width of construction and reconstruction and the character of improvement, repair, and maintenance in each case, consideration being given to the type and character which shall be best suited for each locality and to the probable character and extent of the future traffic.

SEC. 9. That all highways constructed or reconstructed under the provisions of this Act shall be free from tolls of all kinds.

That all highways in the primary or interstate system constructed after the passage of this Act shall have a right of way of ample width and a wearing surface of an adequate width which shall not be less than eighteen feet, unless, in the opinion of the Secretary of Agriculture, it is rendered impracticable by physical conditions, excessive costs, probable traffic requirements, or legal obstacles.

SEC. 10. That when any State shall have met the requirements of this Act, the Secretary of the Treasury, upon receipt of certification from the governor of such State to such effect, approved by the Secretary of Agriculture, shall immediately make available to such State, for the purpose set forth in this Act, the sum apportioned to such State as herein provided.

SEC. 11. That any State having complied with the provisions of this Act, and desiring to avail itself of the benefits thereof, shall by its State highway department submit to the Secretary of Agriculture project statements setting forth proposed construction or reconstruction of any primary or interstate, or secondary or intercounty highway therein. If the Secretary of Agriculture approve the project, the State highway department shall

furnish to him such surveys, plans, specifications, and estimates therefor as he may require; items included for engineering, inspection, and unforeseen contingencies shall not exceed 10 per centum of the total estimated cost of its construction.

That when the Secretary of Agriculture approves such surveys, plans, specifications, and estimates, he shall notify the State highway department and immediately certify the fact to the Secretary of the Treasury. The Secretary of the Treasury shall thereupon set aside the share of the United States payable under this Act on account of such projects, which shall not exceed 50 per centum of the total estimated cost thereof, except that in the case of any State containing unappropriated public lands exceeding 5 per centum of the total area of all lands in the State, the share of the United States payable under this Act on account of such projects shall not exceed 50 per centum of the total estimated cost thereof plus a percentage of such estimated cost equal to one-half of the percentage which the area of the unappropriated public lands in such State bears to the total area of such State: *Provided,* That the limitation of payments not to exceed $20,000 per mile, under existing law, which the Secretary of Agriculture may make be, and the same is hereby, increased in proportion to the increased percentage of Federal aid authorized by this section: *Provided further,* That these provisions relative to the public-land States shall apply to all unobligated or unmatched funds appropriated by the Federal Aid Act and payment for approved projects upon which actual building construction work had not begun on the 30th day of June, 1921.

SEC. 12. That the construction and reconstruction of the highways or parts of highways under the provisions of this Act, and all contracts, plans, specifications, and estimates relating thereto, shall be undertaken by the State highway departments subject to the approval of the Secretary of Agriculture. The construction and reconstruction work and labor in each State shall be done in accordance with its laws and under the direct supervision of the State highway department, subject to the inspection and approval of the Secretary of Agriculture and in accordance with the rules and regulations pursuant to this Act.

SEC. 13. That when the Secretary of Agriculture shall find that any project approved by him has been constructed or reconstructed in compliance with said plans and specifications, he shall cause to be paid to the proper authorities of said State the amount set aside for said project.

That the Secretary of Agriculture may, in his discretion, from time to time, make payments on such construction or reconstruction as the work progresses, but these payments, including previous payments, if any, shall not be more than the United States pro rata part of the value of the labor and materials which have been actually put into such construction or reconstruction in conformity to said plans and specifications. The Secretary of Agriculture and the State highway department of each State may jointly determine at what time and in what amounts payments as work progresses shall be made under this Act.

Such payments shall be made by the Secretary of the Treasury, on warrants drawn by the Secretary of Agriculture, to such offi-

cial or officials or depository as may be designated by the State highway department and authorized under the laws of the State to receive public funds of the State.

SEC. 14. That should any State fail to maintain any highway within its boundaries after construction or reconstruction under the provisions of this Act, the Secretary of Agriculture shall then serve notice upon the State highway department of that fact, and if within ninety days after receipt of such notice said highway has not been placed in proper condition of maintenance, the Secretary of Agriculture shall proceed immediately to have such highway placed in a proper condition of maintenance and charge the cost thereof against the Federal funds allotted to such State, and shall refuse to approve any other project in such State, except as hereinafter provided.

Upon the reimbursement by the State of the amount expended by the Federal Government for such maintenance, said amount shall be paid into the Federal highway fund for reapportionment among all the States for the construction of roads under this Act, and the Secretary of Agriculture shall then approve further projects submitted by the State as in this Act provided.

Whenever it shall become necessary for the Secretary of Agriculture under the provisions of this Act to place any highway in a proper condition of maintenance the Secretary of Agriculture shall contract with some responsible party or parties for doing such work: *Provided, however,* That in case he is not able to secure a satisfactory contract he may purchase, lease, hire, or otherwise obtain all necessary supplies, equipment, and labor, and may operate and maintain such

motor and other equipment and facilities as in his judgment are necessary for the proper and efficient performance of his functions.

SEC. 15. That within two years after this Act takes effect the Secretary of Agriculture shall prepare, publish, and distribute a map showing the highways and forest roads that have been selected and approved as a part of the primary or interstate, and the secondary or intercounty systems, and at least annually thereafter shall publish supplementary maps showing his program and the progress made in selection, construction, and reconstruction.

SEC. 16. That for the purpose of this Act the consent United States is hereby given to any railroad or canal company to convey to the highway department of any State any part of its right of way or other property in that State acquired by grant from the United States.

SEC. 17. That if the Secretary of Agriculture determines that any part of the public lands or reservations of the United States is reasonably necessary for the right of way of any highway or forest road or as a source of materials for the construction or maintenance of any such highway or forest road adjacent to such lands or reservations, the Secretary of Agriculture shall file with the Secretary of the department supervising the administration of such land or reservation a map showing the portion of such lands or reservations which it is desired to appropriate.

If within a period of four months after such filing the said Secretary shall not have certified to the Secretary of Agriculture that the proposed appropriation of such land or material is contrary to the public interest

or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State highway department for such purposes and subject to the conditions so specified.

If at any time the need for any such lands or materials for such purposes shall no longer exist, notice of the fact shall be given by the State highway department to the Secretary of Agriculture, and such lands or materials shall immediately revert to the control of the Secretary of the department from which they had been appropriated.

SEC. 18. That the Secretary of Agriculture shall prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Act, including such recommendations to the Congress and the State highway departments as he may deem necessary for preserving and protecting the highways and insuring the safety of traffic thereon.

SEC. 19. That on or before the first Monday in December of each year the Secretary of Agriculture shall make a report to Congress, which shall include a detailed statement of the work done, the status of each project undertaken, the allocation of appropriations, an itemized statement of the expenditures and receipts during the preceding fiscal year under this Act, an itemized statement of the traveling and other expenses, including a list of employees, their duties, salaries, and traveling expenses, if any, and his recommendations, if any, for

new legislation amending or supplementing this Act. The Secretary of Agriculture shall also make such special reports as Congress may request.

SEC. 20. That for the purpose of carrying out the provisions of this Act there is hereby appropriated, out of the moneys in the Treasury not otherwise appropriated, $75,000,000 for the fiscal year ending June 30, 1922, $25,000,000 of which shall become immediately available, and $50,000,000 of which shall become available January 1, 1922.

SEC. 21. That so much, not to exceed 2½ per centum, of all moneys hereby or hereafter appropriated for expenditure under the provisions of this Act, as the Secretary of Agriculture may deem necessary for administering the provisions of this Act and for carrying on necessary highway research and investigational studies independently or in cooperation with the State highway departments and other research agencies, and for publishing the results thereof, shall be deducted for such purposes, available until expended.

Within sixty days after the close of each fiscal year the Secretary of Agriculture shall determine what part, if any, of the sums theretofore deducted for such purposes will not be needed and apportion such part, if any, for the fiscal year then current in the same manner and on the same basis as are other amounts authorized by this Act apportioned among all the States, and shall certify such apportionment to the Secretary of the Treasury and to the State highway departments.

The Secretary of Agriculture, after making the deduction authorized by this section,

shall apportion the remainder of the appropriation made for expenditure under the provision of the Act for the fiscal year among the several States in the following manner: One-third in the ratio which the area of each State bears to the total area of all the States; one-third in the ratio which the population of each State bears to the total population of all the States, as shown by the latest available Federal census; one-third in the ratio which the mileage of rural delivery routes and star routes in each State bears to the total mileage of rural delivery and star routes in all the States at the close of the next preceding fiscal year, as shown by certificate of the Postmaster General, which he is directed to make and furnish annually to the Secretary of Agriculture: *Provided*, That no State shall receive less than one-half of 1 per centum of each year's allotment. All moneys herein or hereafter appropriated for expenditure under the provisions of this Act shall be available until the close of the second succeeding fiscal year for which apportionment was made: *Provided further*, That any sums apportioned to any State under the provisions of the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916, and all Acts amendatory thereof and supplemental thereto, shall be available for expenditure in that State for the purpose set forth in such Acts until two years after the close of the respective fiscal years for which any such sums become available, and any amount so apportioned remaining unexpended at the end of the period during which it is available for expenditure under the terms of such Acts shall

be reapportioned according to the provisions of the Act entitled "An Act to provide that the United States shall aid the States in the construction of rural post roads, and for other purposes," approved July 11, 1916: *And provided further,* That any amount apportioned under the provisions of this Act unexpended at the end of the period during which it is available for expenditure under the terms of this section shall be reapportioned within sixty days thereafter to all the States in the same manner and on the same basis, and certified to the Secretary of the Treasury and the State highway departments in the same way as if it were being apportioned under this Act for the first time.

SEC. 22. That within sixty days after the approval of this Act the Secretary of Agriculture shall certify to the Secretary of the Treasury and to each of the State highway departments the sum he has estimated to be deducted for administering the provisions of this Act and the sums which he has apportioned to each State for the fiscal year ending June 30, 1922, and on or before January 20 next preceding the commencement of each succeeding fiscal year, and shall make like certificates for each fiscal year.

SEC. 23. That out of the moneys in the Treasury not otherwise appropriated, there is hereby appropriated for the survey, construction, reconstruction, and maintenance of forest roads and trails, the sum of $5,000,000 for the fiscal year ending June 30, 1922, available immediately and until expended, and $10,000,000 for the fiscal year ending June 30, 1923, available until expended.

(a) Fifty per centum, but not to exceed $3,000,000 for any one fiscal year, of the ap-

propriation made or that may hereafter be made for expenditure under the provisions of this section shall be expended under the direct supervision of the Secretary of Agriculture in the survey, construction, reconstruction, and maintenance of roads and trails of primary importance for the protection, administration, and utilization of the national forests, or when necessary, for the use and development of the resources upon which communities within or adjacent to the national forests are dependent, and shall be apportioned among the several States, Alaska, and Porto Rico by the Secretary of Agriculture, according to the relative needs of the various national forests, taking into consideration the existing transportation facilities, value of timber, or other resources served, relative fire danger, and compafative difficulties of road and trail construction.

The balance of such appropriations shall be expended by the Secretary of Agriculture in the survey, construction, reconstruction, and maintenance of forest roads of primary importance to the State, counties, or communities within, adjoining, or adjacent to the national forests, and shall be prorated and apportioned by the Secretary of Agriculture for expenditures in the several States, Alaska, and Porto Rico, according to the area and value of the land owned by the Government within the national forests therein as determined by the Secretary of Agriculture from such information, investigation, sources, and departments as the Secretary of Agriculture may deem most accurate.

(b) Cooperation of Territories, States, and civil subdivisions thereof may be ac-

cepted but shall not be required by the Secretary of Agriculture.

(c) The Secretary of Agriculture may enter into contracts with any Territory, State, or civil subdivision thereof for the construction, reconstruction, or maintenance of any forest road or trail or part thereof.

(d) Construction work on forest roads or trails estimated to cost $5,000 or more per mile, exclusive of bridges, shall be advertised and let to contract.

If such estimated cost is less than $5,000 per mile, or if, after proper advertising, no acceptable bid is received, or the bids are deemed excessive, the work may be done by the Secretary of Agriculture on his own account; and for such purpose the Secretary of Agriculture may purchase, lease, hire, rent, or otherwise obtain all necessary supplies, materials, tools, equipment, and facilities required to perform the work.

The appropriation made in this section or that may hereafter be made for expenditure under the provisions of this section may be expended for the purpose herein authorized and for the payment of wages, salaries, and other expenses for help employed in connection with such work.

SEC. 24. That in any State where the existing constitution or laws will not permit the State to provide revenues for the construction, reconstruction, or maintenance of highways, the Secretary of Agriculture shall continue to approve projects for said State until three years after the passage of this Act, if he shall find that said State has complied with the provisions of this Act in so far as its existing constitution and laws will permit.

SEC. 25. That if any provision of this Act, or the application thereof to any person or circumstances, shall be held invalid, the validity of the remainder of the Act and of the application of such provision to other persons or circumstances shall not be affected thereby.

SEC. 26. That all Acts or parts of Acts in any way inconsistent with the provisions of this Act are hereby repealed, and this Act shall take effect on its passage.

Approved, November 9, 1921.

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IN THE

Supreme Court of the United States

OCTOBER TERM 1937

No. 161

SOUTH CAROLINA STATE HIGHWAY DEPARTMENT, SOUTH CAROLINA PUBLIC SERVICE COMMISSION, ET AL,

Appellants,

vs.

BARNWELL BROS., INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL,

Appellees.

Appeal From the District Court of the United States for the Eastern District of South Carolina

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PETITION OF APPELLEES FOR REHEARING

March 10, 1938.

By J. NINIAN BEALL.
Attorney for Appellees

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Appellees.

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PETITION OF APPELLEES FOR REHEARING

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Barnwell Bros., Inc., Poole Transportation, Inc., Horton Motor Lines, Inc., et al, Appellees, respectfully represents:

Your Honorable Court, by its opinion filed February 14, 1938, in the above-entitled case, misconceived cer-

tain fundamental facts and the procedure of the parties, and both points are reflected in the decision.

The specific point raised and argued was the effect of the "Commerce Clause" of Article I (8) of the Constitution of the United States, standing alone, on the authority of the State to impose size and weight limitations on motor trucks, which burden interstate commerce, by increasing the cost, diminishing the amount, and diverting the flow thereof. As Appellees understand the decision, this Court held that the bare power contained in the "Commerce Clause" was, in the absence of Federal legislation, inoperative to disturb the judgment of the Legislature of the State with respect to regulations deemed necessary for safety and preservation of the highways, provided they do not discriminate against interstate commerce within the State; and that the District Courts of the United States are without jurisdiction to review, under the "Commerce Clause," the reasonableness of the state acts.

A second point, involving the interpretation and application of the Motor Carrier Act, 1935, was raised in the Bill and passed on by the Court below; however, no Cross Appeal was taken on this point.

Point 1

In the opinion, this Court went beyond the point raised on Appeal and said:

"But as the District Court held, Congress has not undertaken to regulate the weight and size of motor vehicles in interstate motor traffic, and has left undisturbed whatever authority in that regard the states have retained under the Constitution."

This statement appears to have the effect of affirming the decision of the Court below on the very impor-

tant point involving the construction of the Motor Carrier Act, 1935, which was not raised on Appeal or by Cross Appeal. Appellees Petition for reconsideration of this statement.

Point 2

The decision on the question of jurisdiction of the Federal Courts to review the "judgment" of State Legislature appears to preclude the Courts from determining whether the State has acted properly under its police power and within its reserved powers, or that it has merely employed these powers as a medium for the invasion of rights to engage in interstate commerce, granted under the Federal Constitution and in derogation of Federal regulation actually established. Appellees Petition for reconsideration to the end that the result stated will not follow.

Point 1

Discussion

The quoted statement follows a reference to Federal aid in the construction of the highways and may have been intended by this Court to refer only to the Federal Highway Aid Acts. This Court referred to the decision of the Court below, which decision referred primarily to the Motor Carrier Act, 1935. Appellees are led to the conclusion that the absence of Cross Appeal, Argument, Brief or Record showing facts relating to the administration of the Motor Carrier Act, 1935, either before this Court, or of a Record before the Court below, has resulted in a serious error of far-reaching results, in that the ruling of the Court below on the interpretation of the Motor Carrier Act, 1935, may appear to have been affirmed.

This is a vital point with respect to which no Cross Appeal was taken, no arguments made, or briefs filed, by either the Appellees or the intervenor, the Attorney General of the United States, nor was any testimony taken by the Court below.

The decision appears to cover the Motor Carrier Act, 1935, and if so construed by District Courts, all efforts to develop a Record of testimony will fail on Motions to Dismiss.

The Interstate Commerce Commission intervened before the Court below, but, pursuant to a definite agreement and understanding, did not intervene before this Court on the present Record. The intervention before this Court by the Attorney General of the United States and the brief filed dealt only with the question of burdens on commerce as they affect the policy of Congress in providing Federal Aid Highways.

None of the Appellees or Intervenors below or before this Court accepted the decision of the Court below as being correct with respect to the effect of the Motor Carrier Act, 1935. Subsequent to the decision by the Court below further proceedings involving the particular question were instituted in other Federal Courts and are now pending.

In at least one of these cases, i.e., *Adams Packing Co., et al* vs. *G. Lee McLain*, individually, and as Adjutant General of the Commonwealth of Kentucky, in the United States District Court for the Eastern District of Kentucky, at Frankfort, the Attorney General of the United States and the Interstate Commerce Commission intervened in connection with the administration and interpretation of the Motor Carrier Act, 1935. In that case Motions to Dismiss have been made, heard, and denied, and the case is awaiting trial on its merits,

at which time the facts should be developed on the Record and then this Court will have the benefit of that Record.

Appellees fear that this Court may have foreclosed all opportunity to develop facts showing the conflict between the Motor Carrier Act, 1935, and state authority. The statement by this Court hereinbefore quoted will probably result in dismissal of these cases and greatly delay, if not defeat, the administration of the Motor Carrier Act, 1935, to the great injury of Appellees and the public.

The broad jurisdiction of this Court in equity proceedings, and judicial notice of statutes, will make it difficult for Appellees to contend before other Courts that the quoted statement was dictum.

Procedural matters contributed to the present difficulty. Appellees recognized the possibility that in an equity appeal the entire bill might be considered and the Motor Carrier Act, 1935, noticed, irrespective of Cross Appeal. But as the Court below was not a court of general equity jurisdiction and the portions of the bill dealing with the Motor Carrier Act, 1935, were, in effect, though not in form, dismissed; for those reasons, Appellees believe that this Court would only consider the points specifically raised by the Appeal. They desired to reserve the point involving the Motor Carrier Act, 1935, until an adequate record could be presented.

The decision of the Court below was not based on a Record in which the essential facts in connection with the Motor Carrier Act, 1935, had been developed. The point was disposed of by the Court below in a manner similar to a dismissal, in that the Court *did not* hear evidence applicable to that question; but consented to

hear evidence only on the question of the unreasonable burden on interstate commerce.

The Court below misconceived the views of the Interstate Commerce Commission, when it said that the Commission denied jurisdiction, and this is evidenced by both prior and subsequent Orders of the Commission as set forth herein.

The quoted statement has the effect of rendering ineffective and unenforceable practically *every provision* of the Motor Carrier Act, 1935. Appellees believe that, in the absence of a Record, it was not the intention of this Court to hold that Congress had not acted in any respect, and had "left undisturbed whatever authority in that regard the States have retained under the Constitution;" or that the Interstate Commerce Commission was without authority to prescribe such regulations as may be necessary to administer the Motor Carrier Act, 1935, in accordance with the numerous specific and general directions of Congress.

If the quoted statement refers to the Motor Carrier Act, 1935, as distinguished from the Highway Aid Acts, it probably goes far beyond what this Court would have said had a Record been made before the Court below and a Cross Appeal taken.

By the Motor Carrier Act, 1935, 49 U. S. C. A. 301, Congress enacted a complete regulatory statute covering transportation by carriers by motor vehicles. It embodied in that single statute the composite field of regulation, which had been developed for railroads, step by step, over a half century of legislation; and in the light of numerous decisions of this Court, covering both discriminations against and burdens on interstate commerce.

The Motor Carrier Act, 1935, is so comprehensive

in scope, general in terms, and inclusive by necessary intendment, that its interpretation would seem to depend *on facts developed on a record, rather than by bare statutory construction.* Record facts would show the conflict between State authority and Federal power actually exercised, either through the Motor Carrier Act, standing alone, or the conflict between the State authority and orders, rules and regulations prescribed by the Interstate Commerce Commission.

Appellees submit that there is a *clear distinction* between Federal Legislation or Commission Regulation of sizes and weights, as such, and Commission Regulation of sizes and weights, *to the extent necessary to prevent the Motor Carrier Act,* 1935, *from becoming a nullity.* Because Congress has not prescribed sizes and weights in an Act and the Commission has not prescribed sizes and weights, *as such,* governing vehicles engaged in interstate commerce, it does not follow that when Congress gave the Commission authority to make "safety regulations", to prescribe "standards of equipment", to require "adequate service", to promote "sound economic conditions", and to prevent "discriminations", that Congress "has left undisturbed whatever authority in that regard the States have retained under the Constitution".

The legislative history of the Motor Carrier Act, 1935, shows that provisions designed to prevent the Interstate Commerce Commission from exercising these powers were eliminated from Bills, rejected by committees, and defeated by vote on the floor. The explanation of the Court below as to the legal reasons for that are now inappropriate, in the light of this Court's decision in this case. The testimony of witnesses before the Congressional Committees quoted by

the Court below was with reference to the Bill as introduced and is hardly indicative of the intent of Congress as expressed in the redrawn Bill and the Act as passed.

MOTOR CARRIER ACT, 1935

49 U. S. C. A. 301

The following provisions of the Motor Carrier Act and its legislative history are referred to by subjects for the purpose of showing the extent to which Congress has acted, with respect to the regulation of motor carriers and more specifically to the extent to which such regulations *necessarily involve some jurisdiction over sizes and weights of motor vehicles.*

The Provisions of the Act

The specific sections of the Motor Carrier Act and the terms which include sizes and weights on the principle that the "greater includes the lesser" are as follows: Section 202(b), "facilities * * * transportation"; Section 203(a)(19), "vehicles"; Section 203(b), "standards of equipment"; Section 203(b)(18), "standards of equipment"; Section 204(a)(1), "Service" (vehicles included in service by definition, see Section 203(a)(19)); Section 204(a)(2), "equipment"; Section 204(a)(3), "standards of equipment"; Section 208(a), "equipment" (used in the sense of vehicles); Section 209(b), "equipment" (used in the sense of vehicles); Section 216(a), "equipment and facilities"; Section 216(b), "equipment and facilities".

The specific sections of the Motor Carrier Act and the terms which by intendment necessarily include jurisdiction over sizes and weights are as follows:

Section 202(a), "inherent advantages * * * sound economic conditions * * * adequate, economical * * *

efficient * * * reasonable charges * * * without unjust discriminations, undue preferences or advantages * * * coordinate * * * properly adapted * * *"; Section 202(b), "procurement of and the provisions of facilities"; Section 204(a)(1), "continuous and adequate service * * * equipment"; Section 204(a)(2), "equipment"; Section 204(a)(3), "standards of equipment"; Section 216(a), "through routes * * * adequate service, equipment and facilities * * * reasonable individual and joint rates, fares and charges"; Section 216(b), "adequate service, equipment and facilities * * *"; Section 216(c), "through routes and joint rates"; Section 216(d), "undue or unreasonable preference or advantage to * * * person, port, gateway, locality or description of traffic * * * unreasonable prejudice or disadvantage".

Considering all of the provisions of the Act in *pari materia* it is evident that without some jurisdiction over sizes and weights, the Commission would be without power over "safety", "service", and "through routes", and without power to prevent discriminations against persons, ports, places, and traffic.

The Motor Carrier Act, 1935, is a general, complete and exclusive Act which, upon the promulgation of regulations by the Interstate Commerce Commission, supersedes all State Laws which are inconsistent with the purposes and objectives of the Federal Law.

The South Carolina Act covering sizes and weights shows on its face that it may conflict with the Federal Law because both deal specifically with the matters of safety and standards of equipment. The State Act may be inconsistent with the Federal Act because the Federal Act takes full jurisdiction over safety, adequate service and proper charges. There is an indis-

soluble relationship between safety, service and charges and the sizes and weights of equipment.

Definition of Equipment

Under the rules of statutory construction, the term "equipment", lacking a prescribed definition, takes the definition recognized in the amended or supplemented Act. In the Interstate Commerce Act, Part I, Sections 1(10); 1(15); 20(1); 1(21), equipment generally refers to vehicles (Interstate Commerce Act, Annotated, Vol. V, General Index, page 4188). In the same Act, safety devices are distinguished from "equipment" by the term "safety appliances" (Interstate Commerce Act, Annotated, Vol. V, General Index, page 4342).

Joint Boards

Instead of stripping the States of all powers, Congress devised a plan of cooperation with the States through Joint Boards created under Section 205 of the Motor Carrier Act. Under this section, the States have jurisdiction which they never had before.

Through Routes and Joint Rates

Congress has taken jurisdiction over "through routes" and "joint rates" and these are terms which were thoroughly understood in the administration of Part I of the Interstate Commerce Act. These terms contemplate that equipment, such as semi-trailers, shall be interchangeable between carriers. The equipment moves through from consignor to consignee, regardless of the number of carriers participating in the "through routes and joint rates" and regardless of the number of States or the variations in State laws as to the width of trucks.

The carriers could not establish and the Commission could not enforce requirements in connection with "through routes and joint rates" if the States could prescribe different widths, heights, and lengths of vehicles at every State line. Through routes and joint rates with interchange of equipment are now in effect in large areas involving many States.

Rail-Motor Coordination

The provisions of the Motor Carrier Act with respect to coordination of transportation by motor carriers and rail carriers is in effect over areas involving several States. Under one of the plans for coordination, which has been approved by the Commission, semi-trailers are pulled by tractors to the railroads and loaded on flat cars, shipped long distances, unloaded in different States and continue the journey under tractor power to the consignee. This plan has a tendency to relieve the highways of certain traffic, but the plan would be entirely defeated if the State in which the consignee may be located could impose a regulation radically different from that of the State of the consignor.

Discriminations

The size of the payload has a direct and substantial bearing on the rates which shippers are required to pay. This feature of operation and regulation is strikingly illustrated in a report of the Interstate Commerce Commission, In the Matter of Container Service, 182 I. C. C. 653. This case involved transportation by motor vehicles which were operated by railroads. At page 663 is set forth a schedule of charges based on minimum payload weights. For a minimum of 6,000 pounds the rate is 40c per hundred pounds and for a

minimum of 10,000 pounds the rate is 30c per hundred pounds, and for 20,000 pounds the rate is 20c per hundred pounds. If this principle of rate making be applied to those shippers affected by the four or five States with low gross weight limitation, a consignor shipping merchandise into or across South Carolina could not possibly ship over 10,000 pounds in one vehicle, therefore, he could not get a rate lower than 30c, but the consignor shipping through North Carolina could ship 20,000 pounds and thereby get a rate of 20c per hundred. In Texas, the consignor could not ship more than 7,000 pounds, therefore, he would have to pay 40c per hundred pounds.

Tariff Conflicts

Motor carriers publish tariffs based on volume ratings and when these tariffs are filed with the Interstate Commerce Commission, they have the effect of law and are binding on the motor carriers and shippers alike. Due to conflicting State laws, motor carriers are prevented from handling volume ratings in certain States, and it becomes necessary for the carriers to publish an exception to their tariffs. The exception withholds volume ratings from shippers when the goods are to move into or across the States having low weight limitations.

It is obvious that there is a direct conflict between the State and the Federal Law and it is impossible for motor carriers to comply with both laws. When the carriers refuse to handle volume ratings in order to comply with the State law, they violate their tariff obligations and duties as common carriers. If they publish higher rates for a smaller volume only, they immediately discriminate between persons and places

and come in conflict with Sections 216(b) and (d) of the Motor Carrier Act, which prohibit discriminations.

The Commission has already suspended several interstate tariffs based on quantities permitted by State laws because the economic loss burdened interstate commerce.

Truck Sizes and Traffic Quantities

Interstate transportation by motor carriers was in its infancy when the Interstate Commerce Commission made its report, Coordination of Motor Transportation, 182 I. C. C. 263, and at page 424 stated that trucks operated by common and contract carriers showed only 11 per cent between 1½ and 3 tons capacity; 60 per cent were from 3½ to 5 tons capacity, and 29 per cent over 5 tons capacity. Today 10 tons or 20,000 pounds is the average unit of interstate commerce in goods and manufacture. Federal Coordinator of Transportation—Freight Traffic Report—page 31—May 6, 1935.

Safety

Surely, it cannot be said that, under the safety provisions of the Motor Carrier Act, 1935, the Commission is without power to limit the height of motor vehicles to prevent them from being topheavy and dangerous. This Court, in sustaining the judgment of the Legislature, stated that weight and width are related to safety. There are no limitations on the authority of the Interstate Commerce Commission to prescribe safety regulations. There are no height limitations in Massachusetts, Maryland, Illinois, Connecticut, and New Hampshire. It cannot be said that Congress has acted with respect to these States and

not as to other States, nor can it be said that Congress has not acted with respect to safety. Some States permit combinations of numerous vehicles, aggregating great length, up to 85 feet, such as Arizona. Permissible gross weights for trucks range from 9 tons in Kentucky to 55 tons in Nevada.

Appellees submit that if the Commission should find that in the interest of safety lower standards should be prescribed, it now has power to do so without further legislation and to impose and enforce suitable regulations; existing State laws notwithstanding.

The Commission in its first safety order, issued December 23, 1936, Ex Parte MC-4, 1 M.C.C. 1, at page 5, gave as part of its program the regulation of "Motor-Vehicle Standards (Sizes and Weights)" and at page 15 it said: "These parts and accessories are important factors in safe operation, but the motor vehicle itself, and particularly its size and weight, must also be considered. We are empowered by the Act to investigate this subject. At least insofar as the regulation of sizes and weight of motor vehicles and combinations thereof has a bearing on safety of operation in interstate or foreign commerce, we believe that we now have authority to undertake such regulation. If it should prove that additional Federal legislation is needed to protect the public interest with respect to this matter, it will be our duty under Section 204(a)(7) of the Act to report to Congress accordingly".

This shows the relationship between safety and sizes and weights as understood by the Commission. It will be noted that with reference to further legislation on the subject of "Sizes and Weights" they referred to Section 204(a)(7) and not to Section 225.

On November 8, 1937, in Ex Parte No. MC 15, the

Commission issued its order for an investigation for the purpose of prescribing "Sizes and Weights".

The order follows in full:

"ORDER

"At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of November, A .D. 1937.

"EX PARTE NO. MC. 15

"IN THE MATTER OF REGULATIONS GOVERNING THE SIZES AND WEIGHT OF MOTOR VEHICLES AND COMBINATIONS OF MOTOR VEHICLES USED BY COMMON AND CONTRACT CARRIERS IN THE TRANSPORTATION OF PASSENGERS AND BY COMMON, CONTRACT, AND PRIVATE CARRIERS IN THE TRANSPORTATION OF PROPERTY IN INTERSTATE OR FOREIGN COMMERCE

"Section 204(a)(1), (2), and (3), and Section 225 of the Motor Carrier Act, 1935, being under consideration, and good cause appearing therefor:

"*It is ordered*, That investigation be, and it is hereby, instituted into the above-described matter for the following purposes:

"1. To enable the Commission to make a report under the provisions of Section 225 on the need for Federal regulation of the sizes and weight of motor vehicles and combinations thereof, and

"2. To enable the Commission to prescribe reasonable requirements under the provisions of Section 204 of the Act as to the sizes and weight of motor vehicles and combinations

thereof insofar as they affect the safety of operation.

"*It is further ordered*, That notice of this proceeding be given to common and contract carriers by motor vehicle and private carriers of property by motor vehicle, as defined in Part II of the Interstate Commerce Act, and other interested parties by such means as the Commission may hereafter adopt and use for that purpose, including the posting of a notice in the office of the Commission's Secretary.

"*And it is further ordered*, That this proceeding be assigned for hearing at such time and place as the Commission may hereafter direct.

"By the Commission.

"W. P. BARTEL,
(SEAL) "*Secretary.*"

SECTION 225—MOTOR CARRIER ACT

It will be noted that Section 225 speaks of *reports* on the need for *regulation*, whereas Section 204 (a) (7) provides for *recommendations* with respect to *legislation*.

Standing alone, Section 225 could possibly be construed as reserving for further consideration legislation, on the subject of sizes and weights of either interstate or intrastate vehicles, or both, as distinguished from regulations under authority delegated to the Interstate Commerce Commission.

Standing alone, it can be construed as a mere matter of procedure to be followed by the Commission in prescribing regulations covering sizes and weights of interstate trucks *and has been so construed by the Interstate Commerce Commission.*

Considered with the Motor Carrier Act as a whole,

it cannot be construed to nullify the Act by defeating its administration. The language employed, though admittedly unfortunate, is susceptible of interpretation consistent with the Act.

The legislative history of the Motor Carrier Act shows that Section 225 was not added to the Bill as introduced, but on the contrary many of the important features of the Act were added subsequent to the inclusion of Section 225. Among such provisions were those in Section 202(a) regarding the preservation of the inherent advantages of motor transportation and reasonable charges therefor without unjust discriminations, undue preferences or advantages. In Section 202(b) there was added the provision giving the Commission jurisdiction over the provision of facilities for transportation. In Section 203(b) standards of equipment were added and repeated in Section 203(b)(7). All of Section 204(a)(3) was added.

The proviso in Section 208(a) regarding equipment was added, and likewise the proviso in Section 209(b), regarding equipment was added. The provisions of Section 216(b) and (c) were added in their entirety. The reservation of power to the States as contained in the proviso at the end of Section 216(e) was added, and Congress did not see fit to reserve to States police powers over interstate commerce.

Congress considered whether it should leave the matter of weights and sizes to the Commission or incorporate regulations in the Act, and it decided to give the Commission jurisdiction for the present. It will be further noted that Section 225 refers to "all motor carriers" whereas the Motor Carrier Act deals only with interstate carriers. If upon investigation by the Commission, it should be found that in order to provide for

the safety of interstate commerce on Federal Aid Interstate Highways, and to protect the investment of the United States in these highways, it should be necessary to regulate the sizes and weights of intrastate traffic, Congress under its plenary powers can do so, as it has already done with respect to the maintenance and repair of such highways. (Federal Aid Act of 1921, Public Law, No. 87, 67th Congress). The inclusion of the word "all" could be construed to refer to such a contingency and to the need for further legislation applicable to intrastate commerce.

All investigations by the Interstate Commerce Commission are called "Reports" and have always been required by law as a condition precedent to the issuance of Orders by the Commission. Sec. 14, Part I. Section 225 of Part II merely prescribes that the usual procedure be observed in connection with the Commission's Orders involving weights and sizes and qualifications and hours of employes.

Legislative History

The following quotations from the *Congressional Record*, 74th Congress, First Session, Vol. 79, are enlightening on the question as to whether Section 225 is to be construed as a limitation on the Commission's authority over sizes and weights, or is to be construed as a procedural requirement, as Appellees contend.

Page 5877, Mr. Wheeler, speaking of the provisions of Section 204 relating to safety of operation and equipment: "This provision, however, is only operative after investigation by the Interstate Commerce Commission and if need is found for such regulation."

Page 5878, Mr. Wheeler, speaking of private carriers and equipment, Section 204(a)(3), said: "Such

regulation is conditioned upon the finding, after investigation, of need therefor * * *."

Page 5879, Mr. Wheeler, speaking of the development of the Act and the requirements in connection with qualifications and maximum hours of service, which terms are mentioned in Section 204, said: "* * * that the Commission felt that they would like first to make a study of the matter, and then come back and report to Congress, *or be given permission* to establish these requirements later; we leave it as the Commission suggested, *giving them power to make the investigation, and if and when they found it necessary to put in effect such rules and regulations as they might deem necessary.*"

Continuing and speaking of the provisions of Section 204 as to all three classes of carriers, the Senator said: "The exercise of this power with respect to the three classes of carriers is intended to be contingent upon the results of the comprehensive investigation of the need for regulation of this kind provided for in Section 225 * * *." "The investigation referred to will permit the Commission not only to develop whether there is need for regulation, but also to establish requirements * * * like authority has been conferred respecting the safety of operation and equipment of private carriers."

Page 5884, Senator Wheeler, speaking of Section 225, pointed out that the investigation to be made was to establish the need for regulation of sizes and weights and of qualifications and maximum hours and that the investigation would "serve to lay the basis for types of regulation which are adapted to the special and varied conditions surrounding the operations of such motor vehicles."

Page 5887, Senator Wheeler, speaking of Section 225 and the investigation provided therein said: "Then we gave them the power in Section 204—to supervise and regulate * * * safety of operation and equipment."

Page 5887, Senator Couzens, remarked that Section 225 would not give the Commission authority to prescribe but only to investigate, and Senator Wheeler answered him as follows: "But on page 10, in Section 204, the Commission is given the power to establish reasonable requirements with respect to the qualifications and maximum hours of service of employes, and the safety of operations and equipment."

Page 12707, Mr. Terry, said: "* * * But what hours shall be observed; what regulations in regard to safety shall be used, depend entirely on the type and character of the service and the type and character of the bus or truck * * *." Mr. Terry, discussing Section 225, said: "In the powers given to the Commission in reference to the regulation of common carriers, it is provided: 'Regulate the maximum hours of service of employes and safety of operation and equipment,' " and then he discusses contract carriers and private carriers and urges the House to vote down an amendment which would write certain standards for hours of service into the bill, because the Committee desires the Interstate Commerce Commission to make this investigation and then provide accordingly.

It would seem to be clear that the investigation which the Commission is required to make is only for the purpose of determining the need for regulation of sizes and weights and for the purpose of determining requirements which would be suitable for different sections of the country. After they have made their

investigation and report, the Commission is authorized to prescribe, to the extent necessary to administer the Act.

There was before Congress the question of regulations suitable for the various sections of the country. The variations between sections were the factors which led Congress to authorize the Commission to investigate and prescribe instead of writing standards into the Bill.

THE INTENT OF CONGRESS WITH RESPECT TO POLICE POWERS

The intent of Congress, the circumstances of the times, and the evils which Congress sought to reach, may be determined not only from the terms of the Act, but from the legislative history.

The Act clearly states the powers which Congress wished to reserve to the States. Section 202(c), reserved the power of taxation and the regulation of intrastate commerce. Section 216(e), reserved jurisdiction over intrastate rates, even though such rates discriminated against interstate commerce. When Congress specifies reservations of powers to the States, that which is not specified is not reserved.

The legislative history shows that Congress did not intend to reserve to the States unlimited police powers over interstate commerce on interstate highways, which powers would impair service, facilities, and burden the commerce among the States.

The Rayburn Bill, H. R. 6836, 73rd Congress, Second Session, undertook to reserve police powers to the States, and Congress took 453 pages of testimony, much of which was to the effect that reservations of police powers to the States would constitute undue

restrictions on the powers of Congress and defeat the purposes of the Act, to secure uniformity and equality (House Committee Hearings on H. R. 6836). The Bill did not pass.

The next year the Wheeler Bill was introduced, S. 1629 and H. R. 5262. The Wheeler Bill did not reserve police powers to the States. The States, acting through their national organization, tried to have the Bill amended to reserve police powers. Both House and Senate Committees rejected the amendment and when it was offered on the floor it was voted down. *Congressional Record*, Vol. 79, pp. 5953, 5954.

DISCUSSION—POINT 2

Prior to the Motor Carrier Act, 1935, the States may have had the power to enact legislation designed to favor transportation of passengers by bus over transportation of freight by truck. They may also have had the power to strangle transportation of property by truck in favor of transportation of property by railroad.

Regulations of this type are made effective by prescribing width limitations for buses consistent with the standards in effect throughout the United States; whereas in the case of trucks, lower standards are prescribed, having the effect of erecting a blockade at the State line. In other cases, dual standards of weight limitations are prescribed for trucks, the higher standard applying when trucks deliver their cargo to railroad stations, and a drastically lower standard applying when the transportation is completed to destination by trucks.

South Carolina, for example, limits trucks (except exempted classes and those covered by local permits)

to 90 inches in width, but permits 96 inches for buses. Act 888, approved June 11, 1936, allows 96 inches for buses.

Clearly, this must be a regulation of the authority to operate as distinguished from a safety regulation. It would be difficult to justify the proposition that a 90-inch width was necessary for the safety of freight, but that the safety of passengers and the public was accommodated with a 96-inch width for buses.

In Texas, motor carriers of freight may haul 7 tons to the nearest railroad station but only 3½ tons if they pass the railroad station. House Bill 336, Chapter 282, page 507, General Laws, Regular Session, 42nd Legislature, Section 7, amending by adding Section 5 b, Chapter 42, General Laws of Texas, passed by the 41st Legislature, Second Called Session. (As the reference is for illustration only, the Act is not set out.) No such method of restricting gross weights, axle weights, or cargo weights is applied to buses.

Kentucky restricts the gross weight of trucks to 18,000 pounds but buses weighing 25,000 pounds or more are permitted to operate, and do operate, over the same highways. Act of March 11, 1932, Section 1, covering definitions applies to trucks and exempts buses, and Section 3 fixes gross weight at 18,000 pounds. (As the reference is for illustration only, the Act is not set out.)

Regulations of the type described are in *purpose and effect* regulation of the authority to engage in interstate commerce. The Interstate Commerce Commission now has exclusive jurisdiction to grant or deny certificates of convenience and necessity for operations in interstate commerce and no State can deprive the

Commission of its jurisdiction by resorting to subterfuge.

Conceivably some color of justification or argument can be advanced linking every State action with some purported exercise of police powers under the guise of safety or protection of the highways. If the Federal Courts may not review the "judgment" of the legislation to determine the bona fides or reasonableness of such legislation, the States are left free to nullify every provision of the Motor Carrier Act, 1935, and every Order of the Commission pursuant thereto.

This Court has repeatedly held that to the extent Congress has exerted its paramount power over the subject of interstate commerce, that the authority of the State is at an end, irrespective of whether the State regulation is consistent, complimentary or for a different purpose.

"That the purpose of Federal regulation of commerce is to secure continuous transportation from one end of the country to the other entirely free from any impositions by State authorities." *Wabash St. L. & P. R. Co.* vs. *Illinois*, 118 U. S. 557.

"The Federal power may be exercised to *require* carriers to be *equipped* to perform the requisite public service." *Dayton-Goose Creek Ry. Co.* vs. *U. S.*, 263 U. S. 456. A provision for such requirements is contained in the Motor Carrier Act, 1935.

This Court had said, "The principle of duality in our system of government *does not* touch the authority of Congress in the regulation of foreign commerce." *Board of Trustees of University of Illinois* vs. *U. S.*, 289 U. S. 48, 57.

In prior cases it has been said that the power to regu-

late interstate commerce is as broad as the power to regulate foreign commerce.

Brown vs. *Houston*, 114 U. S. 622; *Bowman* vs. *C. & N. W. R. Co.*, 125 U. S. 465; *Crutcher* vs. *Kentucky*, 141 U. S. 47; *Pittsburgh & S. Coal Co.* vs. *Bates*, 156 U. S. 577.

In the present case this Court has said that the police powers of the State are "not divisible". Under those circumstances, the police power of the State must end, to the extent that Congress occupied the field of regulation of interstate commerce and such means as Congress may adopt "may have the quality of police regulations". *Hoke* vs. *U. S.*, 227 U. S. 308.

"Commerce between the States has been confided exclusively to Congress and *is not within the jurisdiction of the police power of the State*, unless placed there by Congressional action." *Leisy* vs. *Hardin*, 135 U. S. 100.

Federal regulation is exclusive when Congress has acted and occupied the field. *There can be no divided authority over the same subject matter. Mo. Pac. R. Co.* vs. *Stroud*, 267 U. S. 404; *Northern Pac. R. Co.*, vs. *State of Washington*, 222 U. S. 370; *Erie R. Co.* vs. *State of New York*, 233 U. S. 671.

Even a casual examination of the Motor Carrier Act discloses the extent to which Congress has occupied the field and *a fortiori*, the extent to which the States have been excluded. Whether the State regulation be for the same or a different purpose, Congress having acted under the Motor Carrier Act, such action excludes State regulation; whether consistent, complimentary, additional or otherwise and coincidence is as ineffective as opposition and a State statute is not to be declared a help because it attempts to go further than

Congress has seen fit to go. *Gilvary* vs. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57; *Charleston & W. C. Ry. Co.* vs. *Varnville Furniture Co.*, 237 U. S. 597.

The extent to which this Court has gone in suspending the police powers of the State is illustrated in the case of *Oregon-W. R. Nav. Co.* vs. *State of Washington*, 270 U. S. 87. In that case it was held that the State power to quarantine against the importation of farm produce likely to convey injurious insects was suspended, as to interstate commerce, by U. S. Code, Title 7, Sec. 161, investing the Secretary of Agriculture with full authority over the subject. It was held that such an act cannot be construed as leaving the State at liberty to establish quarantine in the absence of action by the Secretary of Agriculture.

That a State cannot enforce any law obstructing interstate commerce and the name, description, or characterization of an Act by a State Legislature or by State Courts, will not necessarily control all questions of whether it interferes with or burdens interstate commerce and such determination is a Federal question. *La Coate* vs. *Dept. of Conservation of La.*, 263 U. S. 545.

State statutes which by their necessary operation directly interfere with or burden commerce are prohibited regulations and invalid regardless of the purpose with which it was enacted. *Schafer* vs. *Farmer's Grain Co.*, 268 U. S. 189; *Di Santo* vs. *Commonwealth of Pa.*, 273 U. S. 34; *Interstate Buses Corp.* vs. *Holyoke St. Ry. Co.*, 273 U. S. 45.

In the instant case the subject is transportation of interstate commerce which Appellees submit never has been a subject reserved to the States. It is a subject which the States may touch only through the silence

of Congress, and Congress has *ceased to be silent.* The Motor Carrier Act completely occupies the field and whether or not the Motor Carrier Act be construed to vest in the Commission jurisdiction over sizes and weights, as such, the Commission nevertheless has full jurisdiction to make such regulations as may be necessary to effectuate the provisions of the Act. Any ruling to the contrary necessarily has the effect of forcing Congress to completely strip the States of all authority as distinguished from a cooperative plan of procedure as contemplated by the Joint Board arrangement provided for under Section 205 of the Motor Carrier Act.

The Interstate Commerce Act did not give the Commission the authority to limit the length of trains, but it has been held that the States may not do so. *Atchison T. & S. F. Ry. Co.* vs. *La Prade*, 2 Fed. Supp. 855, 861.

Inhibitive Congressional action is not essential to exclude State legislation. It is sufficient if Congress has occupied the field. *Southern R. Co.* vs. *Reed*, 222 U. S. 424.

The continuation of blanket State authority is contrary to the intent and purposes of the Motor Carrier Act, because no investigations or Reports or Orders can be made to determine the proper policy, if States may impose regulations which are economically unsound. This Court has said in similar cases: "There must necessarily be a period for adjustment." *Northern Pacific R. Co.* vs. *Washington*, 222 U. S. 370.

The decision of this Court in the instant case appears to so restrict the authority of the Federal Courts to review Acts of the Legislature that, they will be powerless to review legislative actions for the purpose of determining whether size and weight restrictions are in fact reasonable and necessary exercise of police

powers, or constitute devices for regulating the operating authority of carriers, for the imposition of discriminations between different classes of carriers, and for discriminations against interstate commerce.

HIGHWAYS

Interstate highways are essentially and fundamentally national. Federal jurisdiction would necessarily be an implied power of Federal sovereignty even in the absence of specific Constitutional provisions. A century of Congressional policy and decisions of this Court is consistent with this view. The States are not proprietors but merely trustees for the public. National defense, commerce, post roads and common welfare have necessarily made it so.

There is only one Commerce Clause and it operates to the same extent with respect to all transportation and facilities for transportation including land highways. *California* vs. *Pacific Railroad Co.*, 127 U. S. 1, 39; *Luxton* vs. *North River Bridge Co.*, 153 U. S. 525; *Monongahela Nav. Co.* vs. *U. S.*, 148 U. S. 312.

In addition to more than $2,000,000,000 cash, invested since 1916, millions of acres of land grants have been made to aid in the construction of highways. Beginning with 1802 and continuing down to 1864, and in connection with the admission of Ohio, Louisiana, Indiana, Mississippi, Illinois, Alabama, Missouri, Arkansas, Michigan, Iowa, Wisconsin, Minnesota, Oregon, Kansas, and Nevada into the Union, there have been Federal land grants for highways. In some instances the grants have been exclusively for interstate highways; in some cases for both interstate and intrastate highways; and in some cases for intrastate highways.

Various Federal Acts have declared highways to be post roads.

CONCLUSION

Justice Stone said, in *Borden's Co.* vs. *Baldwin*, 293 U. S. 194: "We are in accord with the view that it is inexpedient to determine grave Constitutional questions upon a demurrer to a complaint or upon an equivalent motion, if there is a reasonable likelihood that the productions of evidence will make the answer clearer." Appellees contend that the failure of the Court below to take evidence on the question of the effect of the State Act on the administration of the Motor Carrier Act, 1935, was in effect equivalent to decision on a motion.

For the foregoing reasons, it is respectfully urged that this Petition for Rehearing be granted:

That the Decree of the District Court of the United States for the Eastern District of South Carolina be not affirmed with respect to that portion of the decision construing, without evidence, the Motor Carrier Act, 1935, as having the effect of leaving the Interstate Commerce Commission without jurisdiction to make such regulations as may be necessary, with respect to safety, service, and the prevention of discrimination between persons and places, and sound economic conditions within the motor transportation industry.

That the case be remanded for further proceedings to take evidence for the purpose of determining whether the size and weight restrictions of South Carolina defeat the purposes of the Motor Carrier Act, 1935, and for the purpose of determining whether such restrictions discriminate against interstate commerce by truck in favor of interstate commerce by bus and

thereby usurp the prerogatives of the Commission with respect to operating authority.

Respectfully submitted,

BARNWELL BROS., INC., POOLE TRANSPORTATION, INC., HORTON MOTOR LINES, INC., ET AL,
Appellees.

By J. NINIAN BEALL

March 10, 1938.

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for the respective Appellees and Petitioners in the foregoing Petition, and that the same is presented in good faith and not for delay.

J. NINIAN BEALL

P. 4, 7, 3

SUPREME COURT OF THE UNITED STATES.

No. 161.—October Term, 1937.

South Carolina State Highway Department, South Carolina Public Service Commission, et al., Appellants,

vs.

Barnwell Brothers, Inc., Poole Transportation, Inc Horton Motor Lines, Inc., et al.

Appeal from the District Court of the United States for the Eastern District of South Carolina.

[February 14, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

Act No. 259 of the General Assembly of South Carolina, of April 28, 1933, 38 Stat. 340, prohibits use on the state highways of motor trucks and "semi-trailer motor trucks" whose width exceeds 90 inches, and whose weight including load exceeds 20,000 pounds. For purposes of the weight limitation § 2 of the statute provides that a semi-trailer motor truck, which is a motor propelled truck with a trailer whose front end is designed to be attached to and supported by the truck, shall be considered a single unit. The principal question for decision is whether these prohibitions impose an unconstitutional burden upon interstate commerce.

Appellees include the original plaintiffs below, who are truckers and interstate shippers; the Interstate Commerce Commission; and certain others who were permitted to intervene as parties plaintiff. The suit was brought in the district court for eastern South Carolina against various state officials, to enjoin them from enforcing §§ 4 and 6 of the Act among others,[1] on the ground that they have been superseded by the Federal Motor Carrier Act of 1935, c. 498, 49 Stat. 546; that they infringe the due process clause of the

[1] § 4. Weight.—No person shall operate on any highway any motor truck or semi-trailer truck [sic] whose gross weight, including load, shall exceed 20,000 pounds.

§ 6. Width.—No person shall operate on any highway any motor truck or semi-trailer motor truck whose total outside width, including any part of body or load, shall exceed 90 inches.

Fourteenth Amendment; and that they impose an unconstitutional burden on interstate commerce. Certain railroads interested in restricting the competition of interstate motor carriers were permitted to intervene as parties defendant.

The district court of three judges, after hearing evidence, ruled that the challenged provisions of the statute have not been superseded by the Federal Motor Carrier Act, and adopted as its own the ruling of the state Supreme Court in *State ex rel. Daniel* v. *John P. Nutt Co.*, 180 S. C. 19, that the challenged provisions, being an exercise of the state's power to regulate the use of its highways so as to protect them from injury and to insure their safe and economical use, do not violate the Fourteenth Amendment. But it held that the weight and width prohibitions place an unlawful burden on interstate motor traffic passing over specified highways of the state, which for the most part are of concrete or a concrete base surfaced with asphalt. It accordingly enjoined the enforcement of the weight provision against interstate motor carriers on the specified highways, and also the width limitation of 90 inches, except in the case of vehicles exceeding 96 inches in width. It exempted from the operation of the decree, bridges on those highways "not constructed with sufficient strength to support the heavy trucks of modern traffic or too narrow to accommodate such traffic safely", provided the state highway department should place at each end of the bridge proper notices warning that the use of the bridge is forbidden by trucks exceeding the weight or width limits and provided the proper authorities take the necessary steps to enforce the law against such use of the bridges. The case comes here on appeal under § 266 of the Judicial Code.

The trial court rested its decision that the statute unreasonably burdens interstate commerce, upon findings, not assailed here, that there is a large amount of motor truck traffic passing interstate in the southeastern part of the United States, which would normally pass over the highways of South Carolina, but which will be barred from the state by the challenged restrictions if enforced, and upon its conclusion that, when viewed in the light of their effect upon interstate commerce, these restrictions are unreasonable.

To reach this conclusion the court weighed conflicting evidence and made its own determinations as to the weight and width of motor trucks commonly used in interstate traffic and the capacity of the specified highways of the state to accommodate such traffic

without injury to them or danger to their users. It found that interstate carriage by motor trucks has become a national industry; that from 85 to 90% of the motor trucks used in interstate transportation are 96 inches wide and of a gross weight, when loaded, of more than ten tons; that only four other states prescribe a gross load weight as low as 20,000 pounds; and that the American Association of State Highway Officials and the National Conference on Street and Highway Safety in the Department of Commerce has recommended for adoption weight and width limitations in which weight is limited to axle loads of 16,000 to 18,000 pounds and width is limited to 96 inches.

It found in detail that compliance with the weight and width limitations demanded by the South Carolina Act would seriously impede motor truck traffic passing to and through the state and increase its cost; that 2,417 miles of state highways, including most of those affected by the injunction, are of the standard construction of concrete or concrete base with asphalt surface, 7½ or 8 inches thick at the edges and 6 or 6½ inches thick at the center; that they are capable of sustaining without injury a wheel load of 8,000 to 9,000 pounds or an axle load of double those amounts, depending on whether the wheels are equipped with high pressure or low pressure pneumatic tires; that all but 100 miles of the specified highways are from 18 to 20 feet in width; that they constitute a connected system of highways which have been improved with the aid of federal money grants, as a part of a national system of highways; and that they constitute one of the best highway systems in the southeastern part of the United States.

It also found that the gross weight of vehicles is not a factor to be considered in the preservation of concrete highways, but that the appropriate factor to be considered is wheel or axle weight; that vehicles engaged in interstate commerce are so designed and the pressure of their weight is so distributed by their wheels and axles that gross loads of more than 20,000 pounds can be carried over concrete roads without damage to the surface; that a gross weight limitation of that amount, especially as applied to semi-trailer motor trucks, is unreasonable as a means of preserving the highways; that it has no reasonable relation to safety of the public using the highways; and that the width limitation of 90 inches is unreasonable when applied to standard concrete highways of the state, in view of the fact that all other states permit a width

of 96 inches, which is the standard width of trucks engaged in interstate commerce.

In reaching these conclusions, and at the same time holding that the weight and width limitations do not infringe the Fourteenth Amendment, the court proceeded upon the assumption that the commerce clause imposes upon state regulations to secure the safe and economical use of highways a standard of reasonableness which is more exacting when applied to the interstate traffic than that required by the Fourteenth Amendment as to all traffic; that a standard of weight and width of motor vehicles which is an appropriate state regulation when applied to intrastate traffic may be prohibited because of its effect on interstate commerce, although the conditions attending the two classes of traffic with respect to safety and protection of the highways are the same.

South Carolina has built its highways and owns and maintains them. It has received from the federal government, in aid of its highway improvements, money grants which have been expended upon the highways to which the injunction applies. But as the district court held, Congress has not undertaken to regulate the weight and size of motor vehicles in interstate motor traffic, and has left undisturbed whatever authority in that regard the states have retained under the Constitution.

But appellees do not challenge here the ruling of the district court that

While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to cur-

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[2] State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the constitutional prohibition even though Congress has not acted. Hall *v.* DeCuir, 95 U. S. 485, 497-498; Wabash, St. L. & P. R. Co. *v.* Illinois, 118 U. S. 557, 575-578; Bowman *v.* Chicago & N. W. R. Co., 125 U. S. 465, 498; Western Union Telegraph Co. *v.* James, 162 U. S. 650, 659, with which compare Western Union Telegraph Co. *v.* Pendleton, 122 U. S. 347, 358; Foster-Fountain Packing Co. *v.* Haydel, 278 U. S. 1, with which compare Geer *v.* Connecticut, 161 U. S. 519, and New York ex rel. Silz *v.* Hesterberg, 211 U. S. 31; Baldwin *v.* Seelig, 294 U. S. 511, 524; see Western Union Telegraph Co. *v.* Kansas, *supra*, 27 *et seq.*

Underlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state. See Cooley *v.* Board of Port Wardens, 12 How. 299, 315; Gilman *v.* Philadelphia, 3 Wall. 713, 731; Escanaba Co. *v.* Chicago, 107 U. S. 678, 683; Lake Shore & M. S. R. Co. *v.* Ohio ex rel. Lawrence, 173 U. S. 285, 294; cf. Pound *v.* Turck, 95 U. S. 459, 464; Cloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 205; Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 499.

tail state power in some measure,[3] it did not forestall all state action affecting interstate commerce. Ever since *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley* v. *Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints.

The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. *Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, 498; *Caldwell* v. *North Carolina*, 187 U. S. 622, 626.[3] It was to end these practices that the commerce clause was adopted. See *Gibbons* v. *Ogden*, 9 Wheat. 1, 187; *Brown* v. *Maryland*, 12 Wheat. 419, 438-439; *Cooley* v. *Board of Port Wardens, supra; State Freight Tax*, 15 Wall. 232, 280; *State Tax on Railway Gross Receipts*, 15 Wall. 284, 289, 297-298; *Cook* v. *Pennsylvania*, 97 U. S. 566, 574; *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217; *Baldwin* v. *Seelig*, 294 U. S. 511, 522; II Farrand, Records of the Federal Convention, 308; III *id.* 478, 547, 548; The Federalist, No. XLII; 1 Curtis, History of the Constitution, 502; Story on the Constitution, § 259. The commerce clause has also been thought to set its own limitation upon state control of interstate rail carriers so as to preclude the subordination of the efficiency and convenience of interstate traffic to local service requirements.[4]

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[3] Footnote 2, *supra*.

[4] See Illinois Central R. Co. v. Illinois, 163 U. S. 142; C. C. C. & St L. R. Co. v. Illinois, 177 U. S. 514; Mississippi R. R. Comm'n. v. Illinois Central R. Co., 203 U. S. 335; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328; Herndon v. Chicago, R. I. & P. R. Co., 218 U. S. 135; Chicago, B. & Q. R. Co. v. Railroad Comm'n. of Wisconsin, 237 U. S. 220; St. Louis & San Francisco R. Co. v. Public Service Comm'n. of Missouri, 254 U. S. 535. Compare Gladson v. Minnesota, 166 U. S. 427; Lake Shore & M. S. R. Co. v. Ohio ex rel. Lawrence, 173 U. S. 285; Gulf, C. & S. F. R. Co. v. Texas, 246 U. S. 58, where statutes requiring local service no greater than necessary for fair accommoda-

But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate. Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse.

From the beginning it has been recognized that a state can, if it sees fit, build and maintain its own highways, canals and railroads and that in the absence of Congressional action their regulation is peculiarly within its competence, even though interstate commerce is materially affected. *Minnesota Rate Cases* (*Simpson v. Shepard*), 230 U. S. 352, 416. Congress not acting, state regulation of intrastate carriers has been upheld regardless of its effect upon interstate commerce. *Id.* With respect to the extent and nature of the local interests to be protected and the unavoidable effect upon interstate and intrastate commerce alike, regulations of the use of the highways are akin to local regulation of rivers, harbors, piers and docks, quarantine regulations, and game laws, which, Congress not acting, have been sustained even though they materially interfere with interstate commerce.[5]

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tion of local needs were held constitutional. Although the states have usually been allowed to impose burdens on interstate railroads in the interest of local safety, Smith *v.* Alabama, 124 U. S. 465; Nashville, C. & St. L. R. Co. *v.* Alabama, 128 U. S. 96; New York, N. H. & H. R. Co. *v.* New York, 165 U. S. 628; Chicago, R. I. & P. R. Co. *v.* Arkansas, 219 U. S. 453; St. Louis, I. M. & S. R. Co. *v.* Arkansas, 240 U. S. 518; *cf.* Hennington *v.* Georgia, 163 U. S. 299, an unnecessarily harsh restriction, even though it is in the interest of safety, has been held to be unconstitutional. Seaboard A. L. Railway *v.* Blackwell, 244 U. S. 310.

[5] Among the state regulations materially affecting interstate commerce which this Court has upheld, Congress not acting, are those which sanction obstruc-

The nature of the authority of the state over its own highways has often been pointed out by this Court. It may not, under the guise of regulation, discriminate against interstate commerce. But "In the absence of national legislation specially covering the subject of interstate commerce, the state may rightly prescribe uniform regulations adapted to promote safety upon its highways and the conservation of their use applicable alike to vehicles moving in interstate commerce and those of its own citizens." *Morris* v. *Duby*, 274 U. S. 135, 143. This formulation has been repeatedly affirmed, *Clark* v. *Poor*, 274 U. S. 554, 557; *Sprout* v. *South Bend*, 277 U. S. 163, 169; *Sproles* v. *Binford*, 286 U. S. 374, 389, 390; cf. *Morf* v. *Bingaman*, 298 U. S. 407, and never disapproved. This Court has often sustained the exercise of that power although it has burdened or impeded interstate commerce. It has upheld weight limitations lower than those presently imposed, applied alike to motor traffic moving interstate and intrastate. *Morris* v. *Duby, supra; Sproles* v. *Binford, supra.* Restrictions favoring passenger traffic over the carriage of interstate merchandise by truck have been similarly sustained. *Sproles* v. *Binford, supra;*

tions in navigable rivers, Willson *v.* Black-Bird Creek Marsh Co., 2 Pet. 245; Ex parte McNeil, 13 Wall. 236; Pound *v.* Turck, 95 U. S. 459; Wilson *v.* McNamee, 102 U. S. 572; Huse *v.* Glover, 119 U. S. 543; cf. Sands *v.* Manistee River Improvement Co., 123 U. S. 288; approve the erection of bridges over navigable streams, Gilman *v.* Philadelphia, 3 Wall. 713; Escanaba Co. *v.* Chicago, 107 U. S. 678; Cardwell *v.* American Bridge Co., 113 U. S. 205; Willamette Iron Bridge Co. *v.* Hatch, 125 U. S. 1; Lake Shore & M. S. R. Co. *v.* Ohio, 165 U. S. 365; require payment of fees as an incident to use of harbors, Cooley *v.* Board of Port Wardens, 12 How. 299; Steamship Co. *v.* Joliffe, 2 Wall. 450; Anderson *v.* Pacific Coast S. S. Co., 225 U. S. 187; Clyde Mallory Lines *v.* Alabama ex rel. State Docks Comm'n., 296 U. S. 261; cf. County of Mobile *v.* Kimball, 102 U. S. 691; control the location of docks, Cummings *v.* Chicago, 188 U. S. 410; impose wharfage charges, Packet Co. *v.* Keokuk, 95 U. S. 80; Packet Co. *v.* Catlettsburg, 105 U. S. 559; Transportation Co. *v.* Parkersburg, 107 U. S. 691; Ouachita Packet Co. *v.* Aiken, 121 U. S. 444; establish inspection and quarantine laws, Turner *v.* Maryland, 107 U. S. 38; Morgan's S. S. Co. *v.* Louisiana Board of Health, 118 U. S. 455; Patapsco Guano Co. *v.* North Carolina Board of Agriculture, 171 U. S. 345; Rasmussen *v.* Idaho, 181 U. S. 198; Smith *v.* St. Louis & S. W. R. Co., 181 U. S. 248; Reid *v.* Colorado, 187 U. S. 137; New Mexico ex rel. McLean & Co. *v.* Denver & R. G. R. Co., 203 U. S. 38; Asbell *v.* Kansas, 209 U. S. 251; Red "C" Oil Mfg. Co. *v.* Board of Agriculture, 222 U. S. 380; Savage *v.* Jones, 225 U. S. 501; Pure Oil Co. *v.* Minnesota, 248 U. S. 158; Mintz *v.* Baldwin, 289 U. S. 346; cf. Railroad Co. *v.* Husen, 95 U. S. 465; Minnesota *v.* Barber, 136 U. S. 313; Brimmer *v.* Rebman, 138 U. S. 78; and regulate the taking or exportation of domestic game, Geer *v.* Connecticut, 161 U. S. 519; New York ex rel. Silz *v.* Hesterberg, 211 U. S. 31; cf. Foster-Fountain Packing Co. *v.* Haydel, 278 U. S. 1, 13, holding invalid a local regulation ostensibly designed to conserve a natural resource but whose purpose and effect were to benefit Louisiana enterprise at the expense of businesses outside the state.

Bradley v. *Public Utilities Commission of Ohio*, 289 U. S. 92, as has the exaction of a reasonable fee for the use of the highways. *Hendrick* v. *Maryland*, 235 U. S. 610; *Kane* v. *New Jersey*, 242 U. S. 160; *Interstate Busses Corp.* v. *Blodgett*, 276 U. S. 245; *Morf* v. *Bingaman, supra;* cf. *Ingels* v. *Morf*, 300 U. S. 290.

In each of these cases regulation involves a burden on interstate commerce. But so long as the state action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.

Congress, in the exercise of its plenary power to regulate interstate commerce, may determine whether the burdens imposed on it by state regulation, otherwise permissible, are too great, and may, by legislation designed to secure uniformity or in other respects to protect the national interest in the commerce, curtail to some extent the state's regulatory power. But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce, and the extent to which, in that field, state power and local interests should be required to yield to the national authority and interest. In the absence of such legislation the judicial function, under the commerce clause as well as the Fourteenth Amendment, stops with the inquiry whether the state legislature in adopting regulations such as the present has acted within its province, and whether the means of regulation chosen are reasonably adapted to the end sought. *Sproles* v. *Binford, supra; Stephenson* v. *Binford*, 287 U. S. 251, 272.

Here the first inquiry has already been resolved by our decisions that a state may impose non-discriminatory restrictions with respect to the character of motor vehicles moving in interstate commerce as a safety measure and as a means of securing the economical use of its highways. In resolving the second, courts do not sit as legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a national commerce. And in reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its

opinion is best adapted to all the diverse interests affected. *Transportation Co.* v. *Parkersburg*, 107 U. S. 691, 695. When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 30; *Laurel Hill Cemetery* v. *San Francisco*, 216 U. S. 358, 365; *Price* v. *Illinois*, 238 U. S. 446, 451; *Hadacheck* v. *Sebastian*, 239 U. S. 394, 408-414; *Thos. Cusack Co.* v. *Chicago*, 242 U. S. 526, 530; *Euclid* v. *Ambler Realty Co.*, 272 U. S. 365, 388; *Zahn* v. *Board of Public Works*, 274 U. S. 325, 328; *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584. This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. *Morris* v. *Duby*, *supra*, 143; *Sproles* v. *Binford*, *supra*, 389, 390; *Minnesota Rate Cases*, *supra*, 399, 400; *Smith* v. *St. Louis & S. W. R. Co.*, 181 U. S. 248, 257; *Reid* v. *Colorado*, 187 U. S. 137, 152; *New York ex rel. Silz* v. *Hesterberg*, 211 U. S. 31, 42, 43.

Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. Cf. *Worcester County Trust* v. *Riley*, 302 U. S. —, —. Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis. *Standard Oil Co.* v. *Marysville*, *supra*; *Borden's Farm Products Co.* v. *Ten Eyck*, 297 U. S. 251, 263; s. c. 11 Fed. Supp. 599, 600. Not only does the record fail to exclude that possibility, but it shows affirmatively that there is adequate support for the legislative judgment.

At the outset it should be noted that underlying much of the controversy is the relative merit of a gross weight limitation as against an axle or wheel weight limitation. While there is evidence that weight stresses on concrete roads are determined by wheel rather than gross load weights, other elements enter into choice of the type of weight limitation. There is testimony to show that the axle or wheel weight limitation is the more easily enforced through resort to weighing devices adapted to ascertaining readily the axle or wheel weight. But it appears that in practice the weight of truck loads is not evenly distributed over axles and wheels; that commonly the larger part of the load—sometimes as much as 70 to 80%—rests on the rear axle and that it is much easier for those who load trucks to make certain that they have complied with a gross load weight limitation than with an axle or wheel weight limitation. While the report of the National Conference on State and Highway Safety, on which the court below relied, suggested a wheel weight limitation of 8,000 or 9,000 pounds, it also suggested that a gross weight limitation might be adopted and should be subject to the recommended wheel limitation. But the conference declined to fix the amount of gross weight limitation, saying: "In view of the varying conditions of traffic, and lack of uniformity in highway construction in the several States, no uniform gross-weight limitations are here recommended for general adoption throughout the country." The choice of a weight limitation based on convenience of application and consequent lack of need for rigid supervisory enforcement is for the legislature, and we cannot say that its preference for the one over the other is in any sense arbitrary or unreasonable. The choice is not to be condemned because the legislature prefers a workable standard, less likely to be violated than another under which the violations will probably be increased but more easily detected. It is for the legislature to say whether the one test or the other will in practical operation better protect the highways from the risk of excessive loads.

If gross load weight is adopted as the test it is obvious that the permissible load must be somewhat lighter than if the axle or wheel weight test were applied. With the latter the gross weight of a loaded motor truck can never exceed twice the axle and four times the wheel limit. But the fact that the rear axle may and often does support as much as 70 or 80% of the gross load, with wheel

weight in like proportion, requires that a gross load limit be fixed at considerably less than four times the permissible wheel limit.

There was testimony before the court to support its conclusion that the highways in question are capable of sustaining without injury a wheel load of 8 or 9,000 pounds, the difference depending upon the character of the tire in use, as against a wheel load of as much as 8,000 pounds, which would be possible under the statutory load limit of 20,000 pounds as applied to motor trucks, and approximates the axle limit in addition to the gross load limit recommended by the National Conference on Street and Highway Safety. Much of this testimony appears to have been based on theoretical strength of concrete highways laid under ideal conditions, and none of it was based on an actual study of the highways of South Carolina or of the subgrade and other road building conditions which prevail there and which have a material bearing on the strength and durability of such highways. There is uncontradicted testimony that approximately 60% of the South Carolina standard paved highways in question were built without a longitudinal center joint which has since become standard practice, the portion of the concrete surface adjacent to the joint being strengthened by reinforcement or by increasing its thickness; and that owing to the distribution of the stresses on concrete roads when in use, those without a center joint have a tendency to develop irregular longitudinal cracks. As the concrete in the center of such roads is thinner than that at the edges, the result is that the highway is split into two irregular segments, each with a weak inner edge which, according to the expert testimony, is not capable of supporting indefinitely wheel loads in excess of 4,200 pounds.

There is little in the record to mark any controlling distinction between the application of the gross load weight limitation to the motor truck and to the semi-trailer motor truck. There is testimony which is applicable to both types of vehicle, that in case of accident the danger from the momentum of a colliding vehicle increases with gross load weight. The record is without convincing evidence of the actual distribution, in practice, of the gross load weight over the wheels and axles of the permissible types of semi-trailer motor trucks, but this does not enable us to say that the legislature was without substantial ground for concluding that the relative advantages of a gross load over a wheel weight limitation are substantially the same for the two types, or that it could not have concluded that

they were so nearly alike for regulatory purposes as to justify the adoption of a single standard for both, as a matter of practical convenience. Even if the legislature were to accept appellees' assumption that net load weights are, in practice, evenly distributed over the wheels supporting the load of a permissible semi-trailer so that with the statutory gross load limit the load on the rear axle would be about 8,000 pounds it might, as we have seen, also conclude that the danger point would then have been reached in the case of some 1,200 miles of concrete state roads constructed without a center joint.

These considerations, with the presumption of constitutionality, afford adequate support for the weight limitation without reference to other items of the testimony tending to support it. Furthermore, South Carolina's own experience is not to be ignored. Before adoption of the limitation South Carolina had had experience with higher weight limits. In 1924 it had adopted a combined gross weight limit of 20,000 pounds for vehicles of four wheels or less, and an axle weight limit of 15,000 pounds. In 1930 it had adopted a combined gross weight limit of 12½ tons with a five ton axle weight limit for vehicles having more than two axles. Act No. 721, 33 Stat. 1182; Act No. 685, 36 Stat. 1192, 1193. In 1931 it appointed a commission to investigate motor transportation in the state, to recommend legislation, and to report in 1932. The present weight limitation was recommended by the commission after a full consideration of relevant data, including a report by the state engineer who had constructed the concrete highways of the state and who advised a somewhat lower limitation as necessary for their preservation. The fact that many states have adopted a different standard is not persuasive. The conditions under which highways must be built in the several states, their construction and the demands made upon them, are not uniform. The road building art, as the record shows, is far from having attained a scientific certainty and precision, and scientific precision is not the criterion for the exercise of the constitutional regulatory power of the states. *Sproles* v. *Binford, supra,* 388. The legislature, being free to exercise its own judgment, is not bound by that of other legislatures. It would hardly be contended that if all the states had adopted a single standard none, in the light of its own experience and in the exercise of its judgment upon all the complex elements which enter into the problem, could change it.

Only a word need be said as to the width limitation. While a large part of the highways in question are from 18 to 20 feet in width, approximately 100 miles are only 16 feet wide. On all the use of a 96 inch truck leaves but a narrow margin for passing. On the road 16 feet wide it leaves none. The 90 inch limitation has been in force in South Carolina since 1920 and the concrete highways which it has built appear to be adapted to vehicles of that width. The record shows without contradiction that the use of heavy loaded trucks on the highways tends to force other traffic off the concrete surface onto the shoulders of the road adjoining its edges and to increase repair costs materially. It appears also that as the width of trucks is increased it obstructs the view of the highway, causing much inconvenience and increased hazard in its use. It plainly cannot be said that the width of trucks used on the highways in South Carolina is unrelated to their safety and cost of maintenance, or that a 90 inch width limitation adopted to safeguard the highways of the State, is not within the range of the permissible legislative choice.

The regulatory measures taken by South Carolina are within its legislative power. They do not infringe the Fourteenth Amendment, and the resulting burden on interstate commerce is not forbidden.

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.